No. 05-130

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IN THE

Supreme Court of the United States

EBAY INC. AND HALF.COM, INC.,
Petitioners,

v.

MERCEXCHANGE, L.L.C.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

JOINT APPENDIX: VOL. II OF III

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January 26, 2006

PETITION FOR CERTIORARI FILED JULY 25, 2005
CERTIORARI GRANTED NOVEMBER 28, 2005

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NOTICE

The following documents have been omitted in the printing of this Joint Appendix. They may be found in the Petitioners' Appendix to the 05-130 Petition For A Writ Of Certiorari at the following pages.

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MercExchange, L.L.C. v. *eBay, Inc.*, 275 F. Supp. 2d 695 (E.D. Va. 2003) 29a-74a

From: Kumamoto, Andrew [akumamoto@cooley.com]
Sent: Monday, June 26, 2000 7:01 PM
To: 'Robertson, Scott'; Randall, Jeffrey; 'twoolston'
Cc: Pope, Patrick
Subject: RE: MercExchange

Scott, Tom and Jeff:

Below is an outline description of where we are in this negotiation and what I think we should try to achieve on Wednesday when we meet.

eBay is interested in acquiring the family of applications related to U.S. Patent No: 5,845,265.

eBay understands that this portfolio includes (at least) the following pending applications: 09/203,286 filed 12/1/98; 09/166,779 filed 10/6/98; 09/253,014 filed 2/19/99; 09/253,015 filed 2/19/99; 09/253,021 filed 2/19/99; 09/253,057 filed 2/19/99; 09/264,573 filed 3/8/99; and 09/418,564 filed 10/15/99.

The purpose of this meeting is agree on a procedure that will allow the parties to develop a process for moving forward including eBay's due diligence re this portfolio of patents.

1. MercExchange will give a brief (30' or so) presentation re the patent family, the types of inventions being prosecuted, and the status of the prosecution of the individual applications;

2. the parties will discuss a process to arrive at a valuation and for eBay to conduct its due diligence.

>—Original Message—

> From: Robertson, Scott
[SMTP:SRobertson@hunton.com]

> Sent: Monday, June 26, 2000 1:15 PM

> To: 'Andrew Kumamoto'; 'Jeffrey Randall'

> Subject: MercExchange

> Importance: High

> Gentleman, I represent MercExchange. I understand there is going to be a meeting at my office on Wednesday at 1:30 PM and that you will be representing ebay in these talks:

> In advance of that meeting—since it is at your request—I would appreciate it if you could email me a proposed agenda for the discussion.

Thank you for your anticipated cooperation.

> Scott L. Robertson
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(202) 778-2238 (direct)
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* Atlanta * Bangkok * Brussels * Charlotte * Hong Kong * Knoxville *London * McLean * Miami * New York * Norfolk * Raleigh * Richmond * Warsaw * Washington *

Exhibit 99.3

Contact: Kevin Pursglove, eBay, 408-376-7458, kevinp@ebay.com Vince Sollitto, PayPal, 888-337-3533, vsollitto@paypal.com

EBAY TO ACQUIRE PAYPAL SHARED MISSION WILL EXPAND PLATFORMS AND BENEFIT CONSUMERS EBAY ANNOUNCES RESULTS FOR SECOND QUARTER 2002

San Jose and Mountain View, CA, July 8, 2002—In a move that will help millions of Internet users buy and sell online, eBay Inc. (Nasdaq: EBAY; www.ebay.com), the world's online marketplace, today announced that it has agreed to acquire PayPal, Inc. (Nasdaq: PYPL; www.paypal.com), the global payments platform. The acquisition, which is subject to various stockholder, government and regulatory approvals, is expected to close around year-end 2002.

A natural extension of eBay's trading platform, the acquisition supports the company's mission to create an efficient global online marketplace. Payment is a vital function in trading on eBay and integrating PayPal's functionality into the eBay platform will fundamentally strengthen the user experience and allow buyers and sellers to trade with greater ease, speed and safety.

The agreement also should benefit eBay shareholders. The combination of the two networks should expand both platforms while minimizing shared operational costs. Strengthening the marketplace and realizing the efficiencies made possible by the acquisition will increase the value of both businesses.

eBay will acquire all of the outstanding shares of PayPal in a tax-free, stock-for-stock transaction using a fixed exchange ratio of 0.39 eBay shares for each PayPal share. Based on

eBay's stock price on July 5. 2002, the acquisition is valued at $1.5 billion. According to preliminary estimates, the recognized purchase price is also expected to include approximately $18 million for acquisition-related costs. The calculation of the final purchase price may vary significantly from these estimates, and will depend upon a number of factors, including the length of time necessary to close the transaction, and the value of eBay stock at closing.

The transaction is expected to be immediately accretive to eBay's pro-forma earnings per share. On a GAAP basis the company will initially incur incremental charges for stock-based compensation and amortization of intangible assets of approximately $4 million and $9 million per quarter, respectively. Accordingly, eBay expects the transaction to be dilutive on a GAAP reported basis.

"eBay and PayPal have complementary missions. We both empower people to buy and sell online" said Meg Whitman, President and CEO of "Together we can improve the user experience and make online trading more compelling. We can also capture greater value from the e-commerce opportunities occurring both on and off our site."

eBay's United States Utility Patent Applications Produced

No.	Filing Date	Title	MercExchange Patents Cited To Patent Office By eBay
1.	23 OCT 1998	Information Presentation and Management in an Online Trading Environment	
2.	09 NOV 1999	Information Presentation and Management in an Online Trading Environment	'265 Patent
3	08 DEC 1999	Integrated Auction	'265 Patent
4	26 JAN 2000	Method and Apparatus for Facilitating User Selection of an Item Category in an Online Auction	
5	29 FEB 2000	Method and System for Harvesting Feedback and Comments Regarding Multiple Items from Users of a Network Based Transaction Facility	'265 Patent
6	09 MAR 2000	Method and Apparatus for Verifying the Identity of a Participant Within an Online Auction Environment	'176, '051 and '651 Patents
7.	29 MAR 2000	Method and System for Automatically Updating Search Results on an Online Auction Site	
8	04 APR 2000	Information Presentation and Management in an Online Trading Environment	'265 Patent
9	24 APR 2000	Generic Attribute Database System	'265 Patent
10	11 MAY 2000	Method and Apparatus for Dual Online Registration Contact Information System	
11	22 MAY 2000	Method and Apparatus for Facilitating On-line Payment Transactions in a Network Based Transaction Facility	
12	30 MAY 2000	Method and System for Reporting Fraud and Claiming Insurance Related to Network Based Transactions	
13	07 JUN 2000	Dynamic Selection of Images for Web Pages	'265 Patent

No.	Filing Date	Title	MercExchange Patents Cited To Patent Office By eBay
14	21 JUN 2000	Method and System for Defining and Uploading Multiple Transaction Descriptions from a Client to a Network Based Transaction Facility	'265 Patent
15	13 JUL 2000	Method and System for Detecting Fraud	'265 Patent
16	21 JUL 2000	Live Auction	'265 Patent
17	13 SEP 2000	Monitoring and Automatic Notification of Irregular Activity in a Network Based Transaction Facility	'265 Patent
18	22 SEP 2000	Method and System for Communicating Selected Search Results Between and First and Second Entities Over a Network	'265 Patent
19	20 NOV 2000	Method and System for Dealing with Non-Paying Bidders Related to Network Based Transactions	
20	04 DEC 2000	Method and Apparatus for Facilitating User Registration in an Online Auction Environment	'176, '051 and '651 Patents
21	08 DEC 2000	Method and System for Categorizing Items in both Actual and Virtual Categories	'265 Patent
22	19 DEC 2000	Method and Apparatus for Providing Predefined Feedback	
23	21 DEC 2000	Method and System for the Creation and Communication of Notes Concerning an Auction Participant or Items with a Networked Base Traction Facility	'265 Patent
24	15 JAN 2001	Method and System to Implement Seller Authorized Bidding within a Network Based Auction Facility	'265 Patent
25	29 JAN 2001	Method and System for Maintaining Log in Preference Information of Users in a Network Based Transaction Facility	
26	05 FEB 2001	Information Presentation and Management in an Online Trading Environment	

No.	Filing Date	Title	MercExchange Patents Cited To Patent Office By eBay
27.	14 FEB 2001	Method and Apparatus for Performing Declining Price Auction Over One or More Networks	'265 Patent
28.	28 MAR 2001	Method and System to Enable a Fixed Price Purchase within an Online Auction Environment	
29.	03 APR 2001	Method and System to Automatically Remind Parties to a Network-based Transaction to Comply with Obligations Established Under Transaction Agreement	
30.	12 JUL 2001	Method and System for Listing Items Globally and Regionally and Customizing Listing According to Currency or Shipping Areas	'265 Patent
31.	12 JUL 2001	Method and Apparatus to Detect Suspicious Transaction within a Network Based Auction Facility	
32.	31 JUL 2001	Method and System to Facilitate Pre-ordering via an Electronic Commerce Facility and to Automatically Facilitate Satisfying of Pre-order Upon Listing of an Appropriate Offering via the Electronic Commerce Facility	'265 Patent
33.	22 AUG 2001	Hide Through-put Reliable Messaging Interface	
34.	12 SEP 2001	Method and Apparatus for Facilitating User Selection of an Item Category in an Online Auction	
35.	01 OCT 2001	Method and Apparatus for Conducting a Discount Program in an Online Auction Environment	'265, '176, '051 and '651 Patents
36.	11 OCT 2001	System and Method to Facilitate Translation of Communication between Entities over a Network	
37.	17 OCT 2001	System and Method to Control Spending of Unsolicited Communications over a Network	'265, '176 and '051 Patents

No.	Filing Date	Title	MercExchange Patents Cited To Patent Office By eBay
38.	31 OCT 2001	Method and Apparatus to Facilitate a Transaction within a Network Based Auction Facility	
39.	13 NOV 2001	Taxonomy Based Database Partitioning	'265 Patent
40.	14 DEC 2001	Method and System Automatically to Support Multiple Transaction Types and to Display Seller Specific Transactions of Various Transaction types in an Integrated Co-mingled listing	'265 Patent
41.	18 DEC 2001	Prioritization of Third Party Access to an Online Commerce Site	'265 Patent
42.	29 JAN 2002	Combined Auction and Fixed Price Check out System	'265 Patent
43.	14 FEB 2002	Determining a Community Rating for a User Using Feedback Ratings of Related Users in An Electronic Environment	'265 Patent

* * * *

. . . interests in all Leased Real Property, in each case free and clear of all Encumbrances, except (i) such as are set forth in Part 2.8 of the Disclosure Schedule, (ii) leases, subleases and similar agreements set forth in Part 2.8 of the Disclosure Schedule, (iii) easements, covenants, rights-of-way and other similar restrictions of record that do not (in any case or in the aggregate) materially detract from the value of the assets subject thereto or materially impair the operations of the Company, (iv) any conditions that may be shown by a current, accurate survey or physical inspection of any Leased Real Property made prior to Closing and that do not, individually or in the aggregate, materially detract from the value of the assets subject thereto or materially impair the operations of the Company, and (v) minor liens that have arisen in the ordinary course of business and have been or will be paid promptly and that do not (in any case or in the aggregate) materially detract from the value of the assets subject thereto or materially impair the operations of the Company.

2.9 Intellectual Property.

(a) Part 2.9(aXi) of the Disclosure Schedule sets forth each trademark, trade name, service mark, service name, patent, patent application and copyright owned by the Company. Part 2.9(a)(ii) of the Disclosure Schedule identifies each trademark, trade name, service mark, service name, patent, patent application and copyright licensed to the Company by any Person (except for any trademark, trade name, service mark, service name, patent, patent application and copyright that is licensed to the Company under any third

party software license generally available to the public at a cost of less than $10,000), and identifies the license agreement under which such trademark, trade name, service mark, service name, patent, patent application and copyright is being licensed to the Company. The Company has good, valid and marketable title to all of the Proprietary Assets identified in Part 2.9(a)(i) of the Disclosure Schedule, free and clear of all liens and other Encumbrances, and has a valid right to use all Proprietary Assets identified in Part 2.9(a)(ii) of the Disclosure Schedule. Except as set forth in Part 2.9(a)(iv) of the Disclosure Schedule, the Company has not developed jointly with any other Person any Company Proprietary Asset with respect to which such other Person has any rights.

(b) The Company has taken all measures and precautions reasonably necessary to protect and maintain the confidentiality and secrecy of all Company Proprietary Assets (except Company. Proprietary Assets whose value would be unimpaired by public disclosure) and otherwise to maintain and protect the value of all Company Proprietary Assets purported to be owned by the Company. Except as set forth in Part 2.9(b)(i) of the Disclosure Schedule, the Company has not (other than pursuant to license agreements identified in Part 2.10 of the Disclosure Schedule) disclosed or delivered to any Person, or permitted the disclosure or delivery to any Person of, (i) the source code, or any portion or aspect of the source code, of any Company Proprietary Asset, or (ii) the object code, or any portion or aspect of the object code, of any Company Proprietary Asset purported to be owned by the Company. All current and former employees, consultants and independent contractors that are or were involved in the creation, invention, research or development of the Company Proprietary Assets have executed and delivered to the Company written agreements assigning to the Company all of their rights, title and interest in and to said Company Proprietary Assets.

(c) Except as set forth in Part 2.9(c)(i) of the Disclosure Schedule, none of the Company Proprietary Assets infringes or conflicts with any Proprietary Asset owned or used by any other Person. Except as set forth in Part 2.9(c)(i) of the Disclosure Schedule, the Company is not infringing, misappropriating or making any unlawful use and the Company has not at any time infringed, misappropriated or made any unlawful use of, or received any notice or other communication of any actual or alleged infringement, misappropriation or unlawful use of, any Proprietary Asset owned or used by any other Person. Except as set forth in Part 2.9(c)(ii) of the Disclosure Schedule, to the best of the knowledge of the Company, no other Person is infringing, misappropriating or making any unlawful use of, and to the best of the knowledge of the Company no Proprietary Asset owned or used by any other Person infringes or conflicts with, any Company Proprietary Asset.

(d) The Company Proprietary Assets constitute all the Proprietary Assets necessary to enable the Company to conduct its business in the manner in which such business has been and is being conducted. The Company has not licensed any of the Company Proprietary Assets to any Person on an exclusive basis and the Company has not entered into any covenant not to compete or Contract limiting its ability to exploit fully any of its Proprietary Assets or to transact business in any market or geographical area or with any Person.

(e) The computer systems and other applicable Company Proprietary Assets are Year 2000 Compliant.

2.10 Contracts.

(a) Part 2.10(a) of the Disclosure Schedule identifies:

(i) each Company Contract relating to the employment of, or the performance of services by, any employee, consultant or independent contractor providing for annual payments in excess of $20,000;

(ii) each Company Contract imposing any restriction on the Company's right or ability (A) to compete with any other Person or (B) to transact business or deal in any other manner with any other Person (other than non-disclosure agreements entered into in the ordinary course of business that only restrict the use of information received from vendors, consultants or other third parties);

(iii) each Company Contract creating or involving any agency relationship, distribution arrangement or franchise relationship;

(iv) each Company Contract relating to the acquisition, issuance or transfer of any securities;

(v) each Company Contract creating or relating to any partnership or joint venture or any sharing of revenues, profits, losses, costs or liabilities;

(vi) each Company Contract with any Related Party (as defined in Section 2.18) other than Contracts with Persons that are controlled by or affiliated with . . .

* * * *

Part 2.9(c)(i)
Infringement by Company of Proprietary
Assets of Any Third Party

1. The Company has registered the following domain names that reference third party marks:

   EBAYZON.COM
   EBAZON.COM
   HALFOFFAMAZON.COM
   HALFFOFFBARNESANDNOBLE.COM
   HALFOFFCDNOW.COM
   HALFOFFMUSICBLVD.COM

   The Company has received no written notice or expression of concern from any third party regarding these domain names.

2. The Company enables its users to execute real-time searches of prices on the internet sites of third parties through its "'Buy it New on the Web' feature". The Company follows industry standard practices for this "'Buy it New on the Web' feature" and will discontinue searching of third party sites if requested by the owner of the site. The Company has not received any notice of any claim with respect to its search price feature.

3. (a) The Company has used the service marks, trade names, trademarks, and other indicia of origin ("Marks"), including the graphical and stylized versions thereof, of third parties on its website for the purpose of merchandising items: Those third parties and Marks are:

   Oprah's Book Club
   Disney
   American Film Institute Playstation
   Dreamcast

   (b) The Company uses the above referenced Marks of

third parties on its website for the purpose of merchandising items. The Company uses the Marks only as plain text The Company believes that such use is "fair use" and the Company has received no notice regarding such use.

4. The Company frames the websites of third parties, including the following:

Amazon.com	Efollett.com
Al books	FatBrain.com
Barnesandnoble.com	Borders.com
Bigstar.com	Virgin Megastore
Bookbuyers Outlet	Best Buy Online
1Bookstreet	MusicDepot
CDWorld	
CD Universe	GamePro SuperStore
EBWorld.com	

Framing may be considered an infringement of proprietary rights of those parties, although the Company has not received any notice of any claim with respect to its framing practices.

5. On June 20, 2000, the Company received an "offer to license ecommerce technology" on behalf of Storefront Development Corporation. The "offer" letter included a summary of an alleged pending patent, titled "Method for Buying and Selling Merchandise in a Network of Users". Storefront had also, for a short period of time, posted a "press release" on its website, www.storefront-development.com, alleging that its pending patent would render the Company's pending patent(s) invalid.

6. In a letter dated June 8, 2000, counsel for Half Price Books, Records, Magazines, claimed that Company's use of "Haltcom" raised trademark issues. Half Price Books, Records, Magazines requested that the Company place a disclaimer on its site stating that it is not affiliated with

claimant. Counsel for the Company has had two conversations with opposing counsel, and currently she is reconsidering her client's position. The Company may or may not hear from this party again.

* * * *

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM 10-K

☐ ANNUAL REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934

For the fiscal year ended December 31, 2000.

OR

☐ TRANSITION REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934

For the Transition Period from ___ to ___.

Commission file number 000-24821

eBay Inc.

(Exact name of Registrant as specified In Its charter)

Delaware	77 0430924
(State or other jurisdiction of incorporation or organization)	(I.RS. Employer Identification Number)
2145 Hamilton Avenue San Jose, California (Address of principal executire offices)	95125 (Zip Code)

(408) 558-7400

(Registrant's telephone number, including area code)

Check whether the registrant: (1) filed all reports required to be filed by Section 13 or I5(d) of the Exchange Act during the past 12 months (or for such shorter period that the registrant was required to file such reports), and (2) has been subject to such filing requirements for the past 90 days. Yes El No ☐

Indicate by check mark if disclosure of delinquent filers pursuant to item 405 of Regulation S-K is not contained herein, and will- not be contained, to the best of the

registrant's knowledge, in definitive proxy or information statements incorporated by reference in Part III of this Form 10-K or any amendment to this Form 10-K. ❑

As of March 1, 2001 there were 269,310,946 shares of the Registrant's common stock, 50.001 par value, outstanding, which is the only class of common or voting stock of the registrant issued as of that date. The aggregate market value of the voting stock held by non-affiliates computed by reference to the closing price for the common stock as quoted by the Nasdaq Stock Market as of March 1, 2001 was approximately 55,395,955,138.

DOCUMENTS INCORPORATED BY REFERENCE

Items 10 through 13 are incorporated by reference to eBay's Proxy Statement for the 2001 Annual Meeting of stockholders to be filed by April 30, 2001.

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PART I

Item 1: Business

This Annual Report on Form 10-K contains forward-looking statements based on our current expectations about our company and our industry. You can identify these forward-looking statements when you see us using words such as "expect," "anticipate," "estimate" and other similar expressions. These forward-looking statements involve risks and uncertainties. Our actual results could differ materially from those anticipated in these forward-looking statements as a result of the factors described in the "Risk Factors" section of Management's Discussion and Analysis of Financial Condition and Results of Operations and elsewhere in this report. We undertake no obligation to publicly update any forward-looking statements for any reason, even if new information becomes available or other events occur in the future.

Corporate Background

eBay Inc. was formed as a sole proprietorship in September 1995, and was incorporated in California in May 1996. In March 1998, we reincorporated in Delaware and completed our initial public offering in September 1998. Our principal executive offices are located at 2145 Hamilton Ave., San Jose, California, 95125, and our telephone number is (408) 558-7400. When we refer to "we" or "eBay" in this Annual Report on Form 10-K, we mean the current Delaware corporation (eBay Inc.) and its California predecessor, as well as all of our consolidated subsidiaries. When we refer to "eBay.corn" we mean the U.S.-based dynamic pricing online trading platform located at www.ebay.com.

The Company

eBay owns and operates eBay.com, which, based upon the aggregate value of goods traded, is the world's largest and most popular online marketplace. Our mission is to develop a global online trading platform that will help practically anyone buy or sell practically anything.

eBay pioneered online personal trading by developing a Web-based community in which buyers and sellers are brought together in an efficient and entertaining format to buy and sell items such as collectibles, automobiles, high-end or premium art items, jewelry, consumer electronics and a host of practical and miscellaneous items. The eBay dynamic pricing (i.e. auction-style) format permits sellers to list items for sale, buyers to bid on items of interest and all eBay users to browse through listed items. eBay's service is fully automated, topically arranged, intuitive and easy to use.

As of March. 1, 2001, through our wholly-owned and partially-owned subsidiaries and affiliates, we operated dynamic pricing online trading platforms in the United States, Germany, the United Kingdom, Australia, Japan, Canada, France, Austria, Italy and South Korea. In February 2001, we

announced an agreement to acquire 100% of the outstanding stock of iBazar S.A., a leading provider of online trading services in Europe and Brazil. With the completion of this acquisition, currently scheduled for the second quarter of 2001, we expect to broaden our international reach in online trading to include Spain, the Netherlands, Belgium, Portugal, Sweden and Brazil. eBay also owns and operates Half.com, which provides an alternative, fixed-price format for trading books, recorded music, movies (VHS, DVD) and video games. Through our 65 percent owned subsidiary Billpoint Inc., we also facilitate online trading transactions by providing sellers and buyers with the necessary tools to conduct person-to-person credit card and electronic check payments safely over the Web.

From December 31, 1998 to December 31, 2000, the number of registered eBay users grew from approximately 2 million to approximately 22 million. eBay users listed over 79 million items for sale in more than 8,000 categories during the fourth quarter of 2000, up from 41 million items in the fourth quarter of 1999. This includes items listed on eBay.com, eBay's international sites and items sold on Half.com. The aggregate value of goods sold, or gross merchandise sales, on the various eBay and Half.com sites in the fourth quarter of 2000, was approximately $1.6 billion, up from $901 million in the fourth quarter of 1999. In 2000, eBay users listed more than 264.7 million items and completed transactions with an aggregate value of more than $5.4 billion:

eBay also owns and operates Butterfields Auctioneers ("Butterfields") and Kruse International ("Kruse"), which provide traditional ovine :auction services for fine art, antiques and collectibles and collector cars, respectively.

Butterfield% established in 1865 is the largest auction house in the Western United States, with full-service galleries in San Francisco and Los Angeles and a regional office in Seattle.

Kruse is one of the world's leading collector car auction companies and sold thousands of cars per year in more than 20 events. In addition to collector cars, the company has auctioned distinctive real estate, vintage aircraft, islands, zoos, railroads and three entire towns.

Industry Background

Growth of the Internet and Online Commerce

The Internet has emerged as a global medium enabling millions of people worldwide to share information, communicate and conduct electronic commerce transactions. According to Nua Internet Surveys, as of November 2000, more than 400 million people worldwide had access to the Internet either at home or work. And, according to Forrester Research, the total value of global e-commerce transactions in 2001 is expected to be more than $1.2 trillion, up from approximately $657 billion in 2000.

The Internet offers the first opportunity to create a compelling global business that overcomes the inefficiencies associated with traditional trading among buyers and sellers of all types. An Internet-based, centralized trading place offers the following benefits:

- facilitates buyers and sellers meeting, listing items for sale, exchanging information, interacting with each other and, ultimately, consummating transactions;
- allows buyers and sellers to trade directly, bypassing traditional intermediaries and lowering costs for both parties;
- is global in reach, offering buyers a significantly broader selection of goods to purchase and providing . sellers the opportunity to sell their goods efficiently to a broader base of buyers; offers significant convenience, allowing trading at all hours and providing continuously updated information;

- fosters a sense of community through direct buyer and seller communication, thereby enabling interaction between individuals with mutual interests; and
- establishes fair market prices for items where no efficient market is in place (e.g. rare items, distressed and surplus rods).

The Opportunity of Online Trading

eBay's online trading platform has historically offered the exchange of goods among buyers and sellers of all types, competing with classified advertisements collectibles shows, garage sales, flea markets and other venues such as auction houses. As eBay's service has evolved, its applicability has expanded to broader categories of items, and to a broader and more global user base. As a result, eBay's product mix has shifted from primarily collectible items to practical everyday items, such as household goods, computers, consumer electronics and other items. With the shift to a broader product offering, its competition has also broadened - and now includes distributors, liquidators, retailers, import and export companies, catalog and mail order companies, and virtually all online and offline commerce participants (consumer-to-consumer, business-to-consumer, and business-to-business).

Many of these traditional trading forums are inefficient because:

- they often have a fragmented, regional nature making it difficult and expensive for buyers and sellers to meet, exchange information and complete transaction
- they may offer a limited variety or breadth of goods;
- they often have high transaction costs; and
- they are often information inefficient, as buyers and sellers lack a reliable and convenient means of setting prices for sales or purchases.

The eBay Online Trading Platform

The core eBay online trading platform permits sellers to list items for sale, buyers to bid for and purchase items of interest and all eBay users to browse through listed items from any place in the world at any time. The eBay website offers buyers a large selection of new and used items that can be difficult and costly to find through traditional distribution channels and offers sellers one of the most efficient and vibrant online distribution channels available. The Half.com fixed price platform permits sellers to list books, recorded music, movies (VHS and DVD) and video games for sale, buyers to purchase items at a price pre-established by the seller, and all Half.com users to browse through listed items from any place at any time.

The eBay service was originally introduced in September 1995 to create an efficient forum for individuals to trade with one another. Since its beginning as a grassroots online trading community, eBay has primarily attracted buyers and sellers through word of mouth and by providing buyers and sellers a place to socialize, discuss topics of common interest and ultimately to trade goods with one another. The number of categories under which eBay users list goods for sale has grown from 10, when eBay was first introduced, to more than 8,000 as of December 31, 2000. The main categories on eBay.com currently include, antiques and art, books, movies, music, coins and stamps, collectibles, computers, dolls, dollhouses, jewelry, photo and electronics, pottery and glass, real estate, sports, toys and miscellaneous items ("everything else"). Specialty marketplaces have also been added to serve the specialized needs of buyers and sellers, for example eBay Motors was developed to serve the automotive marketplace, including vehicles, parts and accessories; eBay Premier was developed to leverage the premium art and collectibles marketplace in conjunction with Butterfields and Half.com is

focused on providing a fixed-price trading environment, initially for books, music, videos and video games.

The principal reasons for eBay's success to date are as follows:

Largest Online Trading Forum. Unlike other commerce trading forums, eBay has aggregated a critical mass of buyers, sellers and items listed for sale, which in turn has resulted in an extremely vibrant and robust trading environment. eBay sellers enjoy generally high sell-through or conversion rates and buyers enjoy an extensive selection of broadly priced goods and services. At December 31, 2000, eBay had over 22 million registered users, offered more than 8,000 product categories and listed more than 6 million items for sale in an auction-style format and more than 8 million items for sale in fixed-price format on Half.com.

Compelling Trading Environment. eBay has created a distinctive trading environment by utilizing entertaining pricing formats, establishing procedural rules and promoting community values that are designed to facilitate trade and communications between buyers and sellers. The trading environment's efficiency is illustrated by the limited need for eBay to intervene or play a significant role in the trading process. The auction pricing format found on eBay creates a sense of urgency among buyers to bid for goods because of the uncertain future availability of unique items on the website. Similarly, by accepting multiple bids at increasing prices, the auction pricing format provides sellers a more efficient means of obtaining a fair market price for their products. While the dynamic and exciting auction format appeals to certain users and is particularly appropriate for unique and other hard-to-value items, many mass-market product categories are more effectively merchandised in a fixed price format, and certain users prefer the immediacy and convenience of a fixed price purchase. Our acquisition of Half.com in July 2000, and the implementation of our "Buy it

Now" fixed price feature on eBay.com, have expanded our marketplace by attracting a new consumer demographic and accelerated the velocity of trading by reducing the length of time between listing an item and completing the transaction.

Trust and Safety Programs. eBay has developed a number of programs designed to make users more comfortable dealing with an unknown trading partner over the Web. eBay's Feedback Forum encourages every user to provide comments and feedback on other eBay users with whom they interact and offers user profiles that provide feedback ratings and incorporate user experiences. In addition, eBay's expanded SafeHarbor™ program provides guidelines for trading, helps provide information to resolve user disputes, responds to reports of misuse of the eBay service and, if necessary, warns or suspends users who violate the terms of its user agreement. eBay's ongoing trust and safety initiatives, including user verification, credit card requirements for sellers, insurance, integrated escrow, authentication and methods to help keep previously suspended users from re-registering on eBay, are all intended to bolster eBay's reputation as a safe place to trade. eBay has also developed an extensive set of rules and guidelines designed to educate users and help implement its policy of prohibiting the sale of illegal or pirated items.

Cost-Effective, Convenient Trading. eBay allows its buyers and sellers to bypass traditionally expensive, regionally fragmented intermediaries and transact business on a 24 hour, seven days a week basis. Because sellers bypass costly intermediaries, they frequently have lower selling costs and an increased likelihood of finding buyers willing to pay the target price. Listing an item on eBay requires sellers to generally pay a nominal placement fee ranging from $0.30 to $3.30 and an additional success fee from 1.25% to 5% of the transaction value if the sale is successfully concluded. Certain categories, namely autos and real estate, have a different fee policy that consists of a $25 and $50 listing fee, respectively,

and a $25 success fee for autos and no success fee for real estate. Listing an item on Half.com is free; successful sellers are charged a commission equal to 15% of the final sale price at the time a buyer pays the seller as well as a shipping fee. As a result of these pricing policies, sellers can cost-effectively sell relatively inexpensive items that had previously been prohibitively expensive to list through most traditional trading forums. By allowing sellers to conveniently and easily reach a broad range of buyers, eBay also addresses the time-consuming, logistical inconvenience of individual selling. Buyers have access to a broad selection of items and avoid the need to pay expensive markups or commissions to intermediaries. The critical mass of items listed on eBay provides a mutual benefit for buyers and sellers allowing both to effectively determine an appropriate price for an item.

Strong Community Affinity. eBay believes that fostering direct interaction between buyers and sellers with similar interests has enabled it to create a loyal, active community of users. eBay has introduced a variety of features and services designed to strengthen this sense of community among eBay users. eBay facilitates communications between buyers and sellers by offering chat rooms, bulletin boards, threaded discussion boards, customer support assistance from its personnel or other eBay users and by providing "About Me" user pages. These community features encourage consumer loyalty and repeat usage.

Intuitive User Experience. The eBay trading platform is a fully automated, topically arranged, intuitive and easy-to-use online service that is available on a 24 hour, seven day a week basis. On the dynamic trading platform, a seller can list items for sale within minutes of completing a simple online form and buyers can submit bids for items quickly and easily. Buyers can easily search the millions of items listed by category or specific item. During the course of the transaction, bidders are notified by email of the status of their bids

on a daily basis and are notified immediately if they are outbid. Sellers and successful bidders are automatically notified when a transaction is completed. To assist users further, eBay offers email customer support staffed on a seven day a week basis. On the Half.com fixed price platform, sellers can easily list items by simply entering the ISBN or UPC bar code number of their item, along with the item's condition and selling price. Half.com automatically adds descriptions and pictures to each listing, so sellers do not need to do it themselves. Buying at Half.com is similar to the shopping experience at other leading online retailers. Buyers can browse by category or search by title or artist/author. When they want to buy, they simply put items in their cart, enter their credit card number and check out. Customers can also see real-time price comparisons of new versions of the same item through an on-screen shopping agent.

eBay Strategy

eBay's objective is to build upon its position as the world's leading community-commerce model and the most compelling commerce platform on the Internet. Our vision is to help practically anyone buy or sell practically anything in the world. The key elements of eBay's strategy are to:

Broaden the eBay Trading Platform. eBay has pursued a multi-pronged strategy for growing the eBay platform in several dimensions: within existing product categories, across new product categories, through geographic expansion, both local and international, and through introduction of additional pricing formats such as fixed price sales. eBay targeted key product categoric in its user programs and marketing activities. eBay has expanded and developed existing product categories by introducing category-specific bulletin boards and chat rooms, integrating category-specific content, advertising its service in targeted publications and participating in targeted trade shows. In addition, eBay broadened the range of users and added product categories, content, features and

other services to meet this new user demand. The increasing number and importance of practical (as opposed to collectible) items on the site is illustrative of this broadened range. eBay has also broadened the range of products that it offers to facilitate trading on the site, including payment services, shipping services, authentication, appraisal, vehicle inspection and escrow services. In addition, eBay has successful introduced two fixed-price formats through Half.com and the "Buy It Now" feature.

During 2000, a number of improvements intended to broaden the eBay trading platform were introduced, including:

- the acquisition of Half.com, a fixed-price, person-to-person trading website where buyers and sellers can trade used books, CDs, movies and video games at fixed prices that are less than the list price;
- the launch of eBay Motors in association with AutoTrader.com, which created the Internet's largest auction-style website for consumers and dealers to buy and sell used cars;
- the launch of additional eBay Regional sites. In 2000, eBay launched eight regional sites to encourage the sale of items that are too bulky or expensive to ship, items of local interest and items that people prefer to view before purchasing;
- the launch of over 5,000 new categories that make it easier to find items in diverse categories;
- the launch of the eBay "Application Program Interface (API) and Developers Program", which allows other companies to use eBay content to drive their own businesses. The API provides three basic benefits. First, it allows eBay to be fully integrated into independent sites across the Internet. A new site will be able to use the eBay commerce engine to power its

business, eliminating time and expense from the start-up process. As a second benefit, the API will allow eBay and its commercial partners to more easily and rapidly add eBay's services to new devices, such as wireless telephones and handheld computers. Finally, the new platform interface will improve the user experience by allowing more companies to provide services to eBay users;

- the introduction of Live Auctions technology on eBay Premier. Providing real-time bidding via the Internet, this new feature allows individuals to participate in the excitement of traditional live sales from auction house floors anywhere in the world;

- the launch of Electronic Checks as a new payment option. Electronic Check is the latest innovation in Internet-based payments, providing buyers and sellers with a means for faster transactions without returned checks, with no paperwork and no charge back risk. For eBay buyers, Electronic Check combines the convenience of paper checks with the safety, convenience and speed of electronic payments. For eBay sellers, Electronic Check is a cost-effective alternative to paper checks and credit cards where payment is guaranteed;

- the launch of eBay Anywhere, a comprehensive mobile strategy that aims to make eBay accessible from any Internet-enabled mobile device. From WAP mobile phones to the latest PDAs, eBay Anywhere brings together leading technology companies, mobile carriers, portals and hardware vendors with the goal of making eBay accessible to any user's choice of handheld Internet device;

- the launch of a new category called eBay Real Estate, intended to make property transactions on eBay easier

for buyers and sellers, and to provide a dedicated home for eBay's emerging, real estate marketplace.

Foster eBay Community Affinity. eBay continues to enhance what is already the largest and one of the most loyal online trading communities on the Web. By instilling a vibrant eBay community experience, eBay seeks to maintain a critical mass of frequent buyers and sellers with a vested interest in the eBay community. eBay believes that new community tools, such, as About Me personal pages and threaded message boards will continue to contribute to the community vibrancy. eBay's trust and safety initiatives, including user verification, requirements for new sellers to have a credit card on file, insurance, integrated escrow, authentication and appraisal are intended to bolster eBay's reputation as u safe place to trade. Consistent with its desire to foster community, eBay has organized a charitable fund, known as the eBay Foundation, and involves the members of the eBay community in determining to which charitable purposes the eBay Foundation's funds will be applied. See "The eBay Service—Community Services."

Enhance Features and Functionality. eBay intends to continually update and enhance the features and functionality of the eBay and Half.com websites to ensure continuous improvement to the trading experience. During 2000, eBay added many new features and services to help buyers and sellers trade with greater ease, including a single login feature, smart search, counters for sellers, Highlight and Feature Plus!, integrated photo hosting, "List in Two Categories," a feature that allows users to cross merchandise their items in two categories simultaneously, a pre-approve bidder tool that gives sellers the ability to set up their own pre. qualification guidelines for bidders, and "Buy It Now," a feature that allows buyers to purchase items immediately and skip the auction process.

Expand Value-Added Services. In order to offer an end-to-end personal trading service, eBay provides a variety of "pre-trade" and "post-trade" services to enhance the user experience and make trading easier. "Pre-trade" services make listing items for sale easier and include photo hosting, authentication and seller productivity software. "Post-trade" services make transactions easier and more comfortable to consummate, such as payment facilitation, insurance, vehicle inspections, escrow, shipping and postage. eBay currently provides, or will provide, these services directly or through strategic partnerships with third parties.

Value-added services introduced during 2000 include:

- the launch of eBay Picture Services, powered by iPIX, which provides eBay users with an easy-to-use, robust set of imaging services that allow sellers to simply drag and drop images into image wells on the eBay Sell Your Item form. Users may also preview their images on the Sell Your Item form and have their images automatically resized and formatted for optimal viewing
- the addition of Saturn and its retailers to provide a nationwide automobile inspection service. The new inspection service, developed and offered by Saturn, is now part of eBay Motors and AutoTrader.com's co-branded automobile site; and
- the integration of Keen.com, the first Live Answer CommunityTM, into key areas of eBay's online trading platform. The integration is intended to make it more convenient for eBay's 22 million users to contact Keen.com's members and get live answers to questions on many topics, including trading and collectibles.

Continue to Develop United States and International Markets. eBay believes that the Internet provides a significant

opportunity for the creation of efficient trading platforms in local, national and international . markets and that over time, these platforms can be transformed into a seamless, truly global trading environment. eBay intends to take advantage of this opportunity by developing eBay for selected local, national and international markets and actively marketing and promoting these services. On the local level, eBay has already rolled out local trading for 60 geographic regions in the United States and has launched a similar regional service offering in Germany, the United Kingdom, Canada and Australia. The creation of regional trading sites makes it easier and more practical to buy and sell items of local interest and items too large, expensive or complex to effectively trade on a wider geographical level. eBay will continue to consider the addition of regional sites in U.S. and international markets that offer a critical mass of users and a significant electronic commerce opportunity. Internationally, eBay has introduced country-specific services for Canada, the United Kingdom, Australia, Germany, Japan, France, Austria, Italy and through the February 2001 acquisition of Internet Auction Company Ltd., South Korea. eBay believes that its user base already includes users located in over 200 countries.

eBay can choose from several strategies to enter new international markets, including building a user community solely through internal efforts, acquiring a company already in the local trading market or partnering with strong local companies. eBay has employed each of these strategies where appropriate, as follows:

- our presence in the United Kingdom, Canada, France, and Italy was built with local management teams and a combination of grass-roots and online marketing programs;
- our presence in Germany was built primarily through the June 1999 acquisition of alando.de.ag, an existing German trading service;

- we entered into a joint venture with a subsidiary of one of the largest media companies in Australia to penetrate this market;
- in February 2000, we announced a relationship with NEC to jointly address the market in Japan. As part of that agreement, NEC agreed to purchase a 30% equity interest in eBay Japan;
- in February 2001, we acquired a majority ownership interest in Internet Auction Co. Ltd., South Korea's largest online trading service; and
- in February 2001, we announced an agreement to acquire 100% of iBazar S.A., Europe's largest online trading platform. iBazar has a leading presence in 7 of its 8 markets, which include France, Italy, Spain, Portugal, the Netherlands, Belgium, Brazil and Sweden.

The eBay Dynamic Pricing Format

The eBay dynamic pricing trading platform is a robust, Internet-based, centralized trading environment that facilitates buying and selling of a wide variety of items.

Registration. While any visitor to eBay can browse through the eBay service and view the items listed for sale, in order to bid for an item or to list an item for sale, buyers and sellers must first register with eBay. Users register by completing a short online form and thereafter can immediately bid for an item or list an item for sale. Users in Canada, Germany, Japan, Australia, the United Kingdom, France, Italy, Austria may instead register through country-specific home pages.

Buying an eBay. Buyers typically enter eBay through its home page, which contains a listing of product categories that allows for easy exploration of current items for sale. Bidders can search for specific items by browsing through a list of items within a category or subcategory and then "clicking

through" to a detailed description for a particular item. Bidders also can search specific categories, interest pages or the entire database of item listings using keywords to describe the types of products in which they are interested. eBay's search engine will then generate a list of relevant items with links to the detailed descriptions. Each item is assigned a unique identifier so that users can easily search for and track specific items. Users also can search for a particular bidder or seller by name in order to review his or her item for sale and feedback history as well as search for products by specific region or search in the "Gallery" mode. Once a bidder has found an item of interest and registered with eBay, the bidder enters the maximum amount he or she is willing to pay at that time. In the event of competitive bids, the eBay service automatically increases bidding in increments based upon the then current highest bid for the item, up to the bidder's maximum price. As eBay encourages direct interaction between buyers and sellers, bidders wishing additional information about a listed item can contact the seller through email functionality. eBay believes that this interaction between bidders and sellers enhances the personal, one-on-one nature of trading on the Web and is art important element of the eBay experience. Once each bid is made, eBay sends a confirmation to the bidder via email, an outbid notice to the next highest bidder and automatically updates the item's auction status. During the course of the sale, eBay notifies bidders immediately via email if they are outbid. Bidders are not charged for making bids or purchases through eBay. In addition, buyers can also specify items of interest on a service called "Favorite Searches" (previously called "Personal Shopper") and receive automated email messages when these particular items are available for sale on eBay. In November 2000, eBay implemented the "Buy it Now" feature. Sellers can choose to use the Buy It Now feature at the time of listing, which allows sellers to name a price at which they would be willing to sell the item to any buyer. Listings are

run in the normal auction format, but will also feature a Buy It Now icon and price. Until the first bid is placed, or in the case of a reserve auction, until the reserve price is met, buyers have the option to buy the item instantly al the specified price without waiting for the listing to end.

Selling on eBay. Sellers registered with eBay can list a produet for sale by completing a short online form or using "Mr. Lister," "Auction Assistant" or third party tools that facilitate the listing of multiple items. The seller selects a minimum price for opening bids for the item and chooses whether the sale will last three, five, seven or ten days. Additionally, a seller may select a reserve price for an item, which is the minimum price at which the seller is willing to sell the item and is typically higher than the minimum price set for the opening bid. The reserve price is not disclosed to bidders. A seller can elect to sell items in individual item listings or, if he or she has multiple identical items, can elect to hold a "Dutch Auction." For example, an individual wishing to sell 10 identical watches could hold 10 individual auctions or hold a Dutch Auction in which the 10 highest bidders would each receive a watch at the same price and all lower bids would be rejected. To be eligible to hold a Dutch auction, a seller must have a sufficiently high feedback rating and must have been a registered seller for at least 60 days. A seller may also specify that an auction will be a private auction. With this format, bidders' e-mail addresses are not disclosed on the item screen or bidding history screen.

Throughout 2000, sellers generally paid a nominal placement fee to list items for sale—S0.25 for an item listing with a minimum starting price of less than S10.00; S0.50 for a minimum starting price of $10.00 to $24.99; 51.00 for a minimum starting price of 325.00 to $49.99; and S2.00 for a minimum starting price of $50.00 or more. As of January 31, 2001, listing fees were increased as follows—S0.30 for an item listing with a minimum starting price of less than

310.00; S0.55 for a minimum starting price of S10.00 to 524.99; 31.10 for a minimum starting price of S25.00 to $49.99; $2.20 for a minimum starting price of 350.00 to 3199.99; and S3.30 for a minimum starting price of $200 or more. By paying an additional S0.50 for items with a starting price of $0.01 to $24.99 or 51.00 for items with a starting price of 525 or more, sellers can choose to have a reserve selling price, which establishes a minimum level at which they are obligated to sell the item. By paying incremental placement fees, sellers can have items featured in various ways. A seller can highlight his or her item for sale by utilizing a bold font for the item heading for an additional fee of $2.00. A seller with a favorable feedback rating can have his or her auction featured as a "Featured Auction" for 599.95, which allows the seller's item to be rotated on the eBay home page, or as a "Featured Plus!" for $19.95, which allows his or her item to appear in its category Featured Item section and in bidder's search results, and the item may be selected for display in another area—the category index page Featured Items section. A seller can also include a description of the product. In addition, a seller can include a photograph in the item's description if the seller posts the photograph on a website and provides eBay with the appropriate Web address. Items may be showcased in the Gallery section with a catalog of pictures rather than text. A seller who uses a photograph in his or her listing can have this photograph included in the Gallery section for 30.25 or featured in the Gallery section for 319.95. Certain categories of items, including real estate, automobiles and "Premier" have different pricing. A seller can choose to list his or her item with the "List in Two Categories" feature, which gives the item, added visibility by listing it in two separate categories. The charge for "List in Two Categories" is double the insertion and optional feature fees (excluding home page featured). In addition, for $0.10 a seller can choose to list his or her item

for 10 days, the longest available duration. All pricing is subject to change.

How Transactions are Completed. When an auction ends, the eBay system validates if a bid exceeded the minimum price, and the reserve price if one has been set. If the sale was successful, eBay automatically notifies the buyer and seller via email and the buyer and seller can then consummate the transaction independent of eBay. At the time of the email notification, eBay generally charges the seller a success fee equal to 5% of the first $25 of the purchase price, 2.5% of that portion of the purchase price from $25.01 to $1,000, and 1.25% of that portion of the purchase price over $1,000. At no point during the process does eBay take possession of either the item being sold or the buyer's payment for the item. Rather, the buyer and seller must independently arrange for the shipment of and payment for the item, with the buyer typically paying for

* * * *

eBay was informed that the inquiry includes an examination of its practices with respect to these transactions. eBay has provided further information in connection with this ongoing inquiry. In order to protect the investigation, the court has ordered that no further public disclosures be made with respect to the matter.

On March 24, 2000, Butterfields received a grand jury subpoena from the Antitrust Division of the Department of Justice requesting documents relating to among other things, changes in Butterfields' seller commissions and buyer premiums and discussions, agreements or understandings with other auction houses, in each case since 1992. eBay believes this request may be related to a publicly reported criminal investigation of auction houses for price fixing. eBay has provided the information requested in the subpoena.

Should these or any other investigations lead to civil or criminal charges against eBay, we would likely be harmed by negative publicity, the costs of litigation, the diversion of management time and other negative effects, even if eBay ultimately prevails eBay's business would suffer if it were not to prevail in any actions like these. Even the process of providing records and information can be expensive, time consuming and result in the diversion of management attention.

A large number of transactions occur on eBay's websites. eBay believes that government regulators have received a substantial number of consumer complaints about eBay which, while small as a percentage of its total transactions, are large in aggregate numbers. As a result, eBay has from time to time been contacted by various foreign, federal, state and local regulatory agencies and been told that they have questions with respect to the adequacy of the steps eBay takes to protect its users from fraud. eBay is likely to receive additional inquiries from regulatory agencies in the future, which may lead to action against it. eBay has responded to all inquiries from regulatory agencies by describing its current and planned antifraud efforts. If one or more of these agencies is not satisfied with eBay's response to current or future inquiries, the resultant investigations and potential fines or other penalties could harm its business.

eBay has provided information to the antitrust division of the Department of Justice in connection with an inquiry into its conduct with respect to "auction aggregators" including our licensing program and our recently settled lawsuit' against Bidder's Edge. Should the division decide to take action against eBay, we would likely be harmed by negative publicity, the costs of the action, possible private antitrust lawsuits, the diversion of management time and effort and penalties we might suffer if we ultimately were not to prevail.

Privacy Policy

eBay believes that issues relating to privacy and the use of personal information relating to Internet users are becoming increasingly important as the Internet; and its commercial use grow. eBay has adopted a detailed privacy policy that outlines how eBay uses information concerning its users and the extent to which other registered eBay users May have access to this information. Users must acknowledge and agree to this policy when registering for the eBay service. eBay does not sell or rent any personally identifiable information about its users to any third party; however, eBay does disclose information to sellers and winning bidders that contains the seller's and winning bidder's name, email address and telephone number. eBay also discloses certain personally identifiable information to its subsidiaries and business partners in connection with the provision of services by these entities. eBay also will disclose customer information in its possession (other than credit card information) to a law enforcement agency or member of the eBay's Verified Rights Owner program that requests this information in connection with a civil, criminal or regulatory investigation. eBay also uses information about its users for internal purposes in order to improve marketing and promotional efforts, to analyze website usage statistically, and to improve content, product offerings and website layout. eBay is a member of the TRUSTe program, a non-profit independent organization that audits websites' privacy statements and audits their adherence thereto.

New and Existing Regulation of the Internet

eBay is subject to the same federal, state and local laws as other companies conducting business on the Internet. Today there art relatively few laws specifically directed towards online services. However, due to the increasing popularity and use of the Internet and online services, many laws relating to the Internet are being debated at the state and

federal levels (both in the U.S. and abroad) and it is possible that laws and regulations will be adopted with respect to the Internet or online services. These laws and regulations could cover issues such as user privacy, freedom of expression, pricing fraud content and quality of products and services, taxation, advertising, intellectual property rights and information security. Applicability to the Internet of existing laws governing issues Sikh property ownership, copyrights and other intellectual property issues, taxation, libel, obscenity and personal privacy is uncertain. The vast majority of these laws were adopted prior to the advent of the Internet and related technologies and, as a result, do not contemplate or address the unique issues of the Internet and related technologies. Those laws that do reference the Internet, such as the Digital Millennium Copyright Act, are only beginning to be interpreted by the courts and their applicability and reach are therefore uncertain. In addition, numerous states, including the State of California, where our headquarters is located, have regulations regarding how "auctions" may be conducted ' and the liability of "auctioneers" in conducting such auctions. No final legal determination has been made with respect to the applicability of the California regulations to its business to date and little precedent exists in this area. Several states arc considering imposing these regulations upon us or our users, which could harm our business. In addition, as the nature of the products listed by our users change, we may become subject to new regulatory restrictions.

Several states have proposed legislation that would limit the uses of personal user information gathered online or require online services to establish privacy policies. The Federal Trade Commission has also settled several proceedings regarding the manner in which personal information is collected from users and provided to third parties. Changes to existing laws or the passage of new laws intended to address these issues could directly affect the way we do business or

could create uncertainty on the Internet. This could reduce demand for its services, increase the cost of doing business as a result of litigation costs or increased service delivery costs, or otherwise harm our business. In addition, because our services are accessible worldwide, and we facilitate sales of goods to users worldwide, foreign jurisdictions may claim that we are required to comply with their laws. For example, a French court has recently ruled that a U.S. website must comply with French laws regarding content. As we have, expanded our international activities, we have become obligated to comply with the laws of the countries in which we operate. Laws regulating Internet companies outside of the United States are in many ways less favorable then those in the United States, giving greater tights to consumers, content owners and users or placing more extensive restrictions on our operations than exist in the U.S. Compliance may be more costly or may require us to change our business practices or restrict its service offerings relative to those in the United States. Our failure to comply with foreign laws could subject eBay to penalties ranging from fines to bans on our ability to offer our services. See "Risk Factors—There are many risks associated with our international operations."

Item 2: *Properties*

On March 1, 2000, eBay entered into a five-year lease for approximately 460,000 square feet of which the online segment occupies approximately 190,000 square feet of general offiee facilities located in San Jose, California. Payments under this lease, which commenced during 2000, are based on a spread over the London Interbank Offering Rate ("LIBOR") applied to the $126.4 million cost of-the facility funded by the lessor. eBay has an option to renew the lease for up to two five-year extensions subject to specific conditions. Under the terms of the lease agreement, eBay was required to place $126.4 million of cash and investment securities as collateral for the term of the lease. The cash and

investment securities are restricted as to their withdrawal from the third party trustee and are classified as long-term restricted cash and investments in the accompanying balance sheet.

eBay entered into two interest rate swaps on June 19 and July 20, 2000, totaling $95 million, to reduce the impact of changes in interest rates on a portion of the floating rate operating lease for our facilities. The interest rate swaps allow eBay to receive floating rate receipts based on LIBOR in exchange for making fixed rate payments which effectively changes the interest rate exposure on our operating lease from a floating rate to a fixed rate on $95 million of the total $126.4 million operating lease.

The online segment leases an additional 140,000 square feet of office space. This office space is primarily for eBay's customer call center in Utah and Half.com's administrative offices in Pennsylvania. Office space for . . .

* * * *

eBay Inc.

NOTES TO COLSOLIDATED FINANCIAL STATEMENTS (Continued)

III Potrero Partners, LLC ("III Potrero") is a limited liability corporation organized in May 1996. 111 Potrero owns several commercial properties located in San Francisco and Los Angeles, which are currently occupied by Butterfields and third parties.

HBJ Partners, LLC ("HBJ") is a limited liability corporation organized in California in September 1996. HBJ owns several commercial properties located in San Francisco, which arc currently occupied by Butterfields and third parties. HBJ also has general partnership interests in 17600 Santa Fe Avenue Partners and 2959 Victoria Street. As of December

31, 2000, ownership interests in the above partnerships were 94% and 85%, respectively.

The aggregate consideration exchanged for the acquisition was 2,654,740 shares of eBay common stock. The acquisition has been accounted for as a pooling of interests. In April 1999, Butterfields withdrew its registration statement for its initial public offering. Accordingly, in the second quarter of 1999, eBay recorded a charge of approximately 52.6 million related to the costs of the withdrawn offering.

alando.de.ag

On June 15, 1999, eBay acquired all of the outstanding stock of alando.dc.ag (''alando''). alando began operations on February 19, 1999 and is Germany's leading online personal trading community. The aggregate consideration exchanged for the acquisition was 632,000 shares of eBay common stock. The acquisition has been accounted for as a pooling of interests.

Half. com

On July 11, 2000, eBay acquired Half.com- Half.com was incorporated in Pennsylvania in June 1999 and provides a filed-price, person-to-person e-commerce site that allows people to buy and sell previously owned goods at discounted prices.

In connection with the merger, eBay issued, or reserved for issuance, a total of approximately 5,484,000 shares of eBay common stock to Halicom's existing shareholders, option holders and warrant holden as consideration for all shares of capital stock, options and warrants of Hallcomheld immediately prior to consummation of the merger. The merger has been accounted for as a pooling-of-interests.

The results of operations previously reported by eBay and Half.com are summarized as follows (in thousands):

	Six Months Ended June 30,		Year Ended December 31,
	1999	2000	1999
Net revenues:			
eBay	$92,289	$183,152	$224,724
Half.com		867	
	$92,289	$184,019	$224,724
Net income (loss):			
eBay	$ 4,581	$ 17,871	$ 12,828
Half.com		(8,661)	(1,261)
	$ 4,581	$ 9,210	$ 11,567

There were no adjustments required to comform the accounting policies of Half-com to those of eBay.

See Subsequent Events—Note 16.

* * * *

UNITED STATES SECURITIES AND EXCHANGE COMMISSION

Washington, D.C. 20549

Form 10-Q

QUARTERLY REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934

For the quarterly period ended September30, 2002. or

TRANSITION REPORT PURSUANT TO SECTION 13 OR15(d) OF THE SECURITIES EXCHANGE ACT OF 1934

For the Transition Period from to

Commission file number 000-24821

eBay Inc.

(Exact name of registrant as specified in its charter)

Delaware	77-0430924
(State or other jurisdiction of incorporation or organization)	(I.R.S. Employer Identification Number)
2145 Hamilton Avenue	95125
San Jose, California	(Zip Code)

(Address of principal executive offices)

(408)376-7400

(Registrant's telephone number, including area code)

Indicate by check mark whether the registrant: (1) has filed all reports required to be filed by Section 13 or 15(d) of the Exchange Act during the preceding 12 months (or for such shorter period that the registrant was required to file such reports), and (2) has been subject to such filing requirements for the past 90days.

Yes No

As of October 31, 2002, there were 308,732,085 shares of the registrant's common stock, $0.001 par value, outstanding, which is the only class of common or voting stock of the registrant issued.

* * * *

eBay Inc.

NOTES TO CONDENSED CONSOLIDATED FINANCIAL STATEMENTS

(Unaudited)

Note 1—The Company and Summary of Significant Accounting Policies:

The Company

eBay Inc. was incorporated in California in May 1996, and reincorporated in Delaware in April 1998. As of September30, 2002, we operated websites localized for the United States, Australia, Austria, Belgium, Canada, France, Germany, Ireland, Italy, the Netherlands, New Zealand, Singapore, South Korea, Spain, Sweden, Switzerland, Taiwan and the United Kingdom. We pioneered online trading by developing a Web-based community in which buyers and sellers are brought together to buy and sell almost anything. The eBay online marketplace permits sellers to list items for sale, buyers to immediately purchase or bid on items of interest, and all eBay users to browse through listed items in a fully-automated, topically-arranged service that is available online seven days a week.

On October3, 2002, we completed our acquisition ofPayPal, Inc. in a tax-free, stock-for-stock transaction. PayPal provides a global payments platform and is headquartered in Mountain View, California. The PayPal financial statements will be included in our consolidated financial statements effective with the October3, 2002 acquisition date.

Use of Estimates

The preparation of consolidated financial statements in conformity with generally accepted accounting principles requires management to make mates and assumptions that

affect the reported amounts of assets and liabilities and the disclosures of contingent assets and liabilities at the of the consolidated financial statements, as well as the reported amounts of revenues and expenses during the reporting period. Actual results could differ from those estimates.

Principles of Consolidation and Basis of Presentation

The accompanying condensed consolidated financial statements as of December31, 2001 and September 30, 2002, and for the three and nine months ended September 30, 2001 and 2002, are unaudited. The unaudited condensed consolidated financial statements have been prepared on the same basis as the annual consolidated financial statements and, in the opinion of management, reflect all adjustments, which include only normal recurring adjustments, necessary to present fairly our financial position, as of September30, 2002, and our results of operations and cash flows for the three and nine months ended September30, 2001 and 2002, respectively. These condensed consolidated financial statements and related notes should be read in conjunction with our audited consolidated financial statements and related notes included in our 2001 Annual Report on Form10-K as filed with the Securities and Exchange Commission on March25, 2002. Our balance sheet as of December31, 2001, was derived from audited financial statements but does not include all disclosures required by generally accepted accounting principles. Our results for the three and nine months ended September30, 2002 are not necessarily indicative of the expected results for any other interim period or the year ending December31, 2002. The accompanying condensed consolidated financial statements include the accounts of eBay and its majority-owned subsidiaries. All significant intercompany balances and transactions have been eliminated in consolidation. Certain prior period balances have been reclassified to conform to the current period presentation.

New Accounting Standards

In July 2001, the Financial Accounting Standards Board ("FASB") issued Statement of Financial Accounting Standards ("SFAS") No.141 and No.142, Business Combinations and Goodwill and Other Intangible Assets. SFAS No.141 requires all business combinations initiated after June 30, 2001, to be accounted for using the purchase method. Under SFAS No.142, goodwill is no longer subject to amortization . . . .

* * * *

LICENSE AGREEMENT

By

And

Between

MERCEXCHANGE, LLC

And

AUTOTRADER.COM, INC.

This LICENSE AGREEMENT, (hereinafter the "Agreement") is entered into this 20th day of December 2002 (the "Effective Date") by and between

MercExchange LLC, ("MercExchange" or the Licensor")
a Virginia Limited Liability Company,
having a principal place of business at
9124 Potomac Ridge Road,
Great Falls, Virginia 22066;

and

AutoTrader.com, LLC, ("ATC" or the "Licensee"), a
Delaware Limited Liability Company, having, a principal
place of business at
5775 Peachtree Dunwoody Road
Suite A-200
Atlanta, GA 30342

RECITALS

WHEREAS, Licensee provides an online motor vehicle listing service; and

WHEREAS, Licensor holds certain patents and patent applications relating, among other things, to the operation of online auction-style services; and

WHEREAS, Licensor desires to grant Licensee a license to the Subject Patents and to transfer Licensor Technology to Licensee subject to the terms and conditions as set forth herein;

NOW, THEREFORE, in consideration of the promises and of the mutual covenants contained herein, the parties hereby agree to the following terms and conditions.

ARTICLE I
DEFINITIONS

1.1 The term "Calendar Quarter" means any period of three consecutive months beginning on January 1, April 1, July 1, or October 1 in any calendar year.

1.2 The term "Calendar Year" means the ATC fiscal year, which currently runs from January 1 through December 31.

1.3 The term "Field of Use" means motor-vehicle related commerce and marketing, including listing, marketing, offering for sale, and/or sale of motor vehicles (including cars, vans, SUVs, trucks, motorcycles, RVs, watercraft, aircraft, etc.) and related parts, accessories, and services, it being understood that the Field of Use does not include toy cars, radio-controlled toy cars, Matchbox cars, and the like.

1.4 The term "Listing Fees" means the gross fees derived and actually collected in the applicable Calendar Quarter by Licensee from the sale of listings of motor vehicles to be sold via an auction-style mechanism offered through Licensee's website, currently located at www.autotradercom, or any successor to such website (owned by Licensee or its successor(s)), or through any co-branded or private label version of such services or website, net only of bad debt written off, credits issued, commissions paid by Licensee to

sales representatives, and taxes collected, if any. Listing Fees include basic listing fees, premium placement fees, final value or success fees, if any, and the like, but will not include fees paid for ancillary goods or services such as loans, inspections, warranties, insurance, and the like.

1.5 The term "Subject Patents," as used in this Agreement, shall mean all of Licensor's issued patents and all patents that issue from any of Licensor's pending patent applications; any patents that may issue from continuations, continuations-in-part or divisional applications that claim priority from any of these; any reexaminations and reissues of such patents; and any foreign counterparts of any of these, including, without limiting the generality of the foregoing, the following (issued patents in bold):

A. U.S. Patent Application No. 08/427,820, Entitled "Consignment Nodes";

B. U.S. Patent Application No. 08/554,704, Entitled "Consignment Nodes," Now U.S. Patent No. 5,845,265;

C. U.S. Patent Application No. 09/203,286 (Petition for Interference with U.S. Patent No. 5,794,207) Entitled "Consignment Nodes";

D. U.S. Patent Application No. 09/166,779, Entitled "Method and Apparatus for Facilitate Internet Commerce with Binding Offers to Sell and Binding Counter-Offers to Buy in an Electronic Market";

E. U.S. Patent Application No. 09/253,014, Entitled "Method and Apparatus for Facilitating Electronic Commerce Through Internet Auctions";

F. U.S. Patent Application No. 09/253,021, Entitled "Method and Apparatus for Facilitating Internet Commerce Through Inter-networked Markets and Auctions," now U.S. Patent No. 6,202,051;

G. U.S. Patent Application No. 09/253,015, Entitled "Methods and Apparatus for Automatically Distributing, Internet Advertising";

H. U.S. Patent Application No. 09/253,057, Entitled "Method and Apparatus for Facilitating Electronic Commerce Through Two-Tiered Electronic Markets and Auctions," Now U.S. Patent No. 6,266,651 (the "651 Patent");

I. U.S. Patent Application No. 09/264,573, Entitled "Method and Apparatus for Using Search Agents to Search Plurality of Markets for Items," Now U.S. Patent No. 6,085,176;

J. U.S. Patent Application No. 09/670,651, Entitled "System for Facilitating Electronic Commerce Transactions";

K. U.S. Patent Application No. 09/670,652, Entitled "System for Facilitating Commerce at an Internet-Based Auction";

L. U.S. Patent Application No. 09/556,653, Entitled "Monitoring Electronic Auctions for Desired Goods or Services";

M. U.S. Patent Application No. 09/557,617, Entitled "Consignment Nodes";

N. U.S. Patent Application No. 09/644,857, Entitled "Consignment Nodes"; and

O. U.S. Patent Application No. 09/418,564, Entitled "Consignment Nodes."

1.5.1 The term "Core Patents" means all of the Subject Patents except for the '651 Patent and patents the United States Patent Office ora foreign patent office requires to be co-terminus with the '651 Patent to obviate a .double-patenting rejection (the "'651 Subject Matter").

ARTICLE II
LICENSE

2.1 License Grant. Licensor hereby grants to Licensee, during the Term of this Agreement, a world wide, non-exclusive license, with right of sublicense (under Section 5.5 only), to the Subject Patents within the Field of Use (the "License"). The License will pertain to all activities of ATC within the Field of Use, and to any person or entity conducting activities within the Field of Use for ATC's benefit, or on or through ATC's website (currently located at www.auto trader.com), or any successor website, or through any co-branded or private label version of such website, or through any website, or portion of a website, operated by ATC for the benefit of a third party (where ATC is acting as provider of a platform for online services, whether as service bureau, application service provider, or otherwise). All rights not expressly granted hereunder are retained by Licensor.

2.2 License Grant Runs with the Subject Patents. The License granted under this Agreement will run with the Subject Patents, such that it will remain valid and fully enforceable in the event that the Subject Patent(s), or any of them, or MercExchange itself, is acquired by another entity.

ARTICLE

ISSUE FEE, ROYALTIES AND RECORDS

3.1 Issue Fee. Licensee shall pay Licensor a one time non-refundable license issue fee of 5450,000.00 within 5 business days after the Effective Date of this Agreement.

3.2 Royalties for Core Patents. In consideration of the grant of the License to the Core Patents, Licensee will pay Licensor an ongoing royalty, calculated as described below, if and only if the conditions described below are met:

3.2.1 If Licensor, through enforcement of its rights to the Subject Patents, obtains a judicial injunction that prohibits eBay, Inc. from operating within the Field of Use, then, and only then, ATC will pay Merc-Exchange ongoing royalties, quarterly during the life of any Subject Patent that would be infringed by ATC's auction-related activities but for the License granted under this Agreement, but only during the time the injunction is in force, during any Calendar Year in which ATC's Annual Listing Fees exceed 512 million (the "Ongoing Royalties"). The Ongoing Royalties will be calculated as follows:

Royalty Schedule

Royalty Rate	Annual Listing Fees
0%	of annual License Fees up to $ 12 million
2.5%	of annual License Fees between $12 million and $24 million
5%	of annual Listing Fees between $24 million and $48 million
7.5%	of annual Listing Fees in excess of $48 million

3.2.2 If the annual Listing Fees collected by ATC exceed the applicable threshold during any given Calendar Year, but the injunction referenced in Section 3.2.1, above, remains in effect only during a portion of such Calendar Year, then the Ongoing Royalties due Licensor during such Calendar year will be pro rated

based on the number of days during which the injunction remains in effect.

3.3 Royalties for '651 Subject Matter. The parties understand that Licensee does not need a license to the '651 Subject Matter to operate the auction-style listing service that it is currently contemplating (as reflected in Exhibit A). However, should Licensee alter the operation of its auction-style listing service, such that Licensor forms the good-faith judgment that Licensee is practicing the '651 Subject Matter, then Licensor will give Licensee notice that it believes that Licensee is practicing the '651 Subject Matter. Within 30 days after Licensee receives such notice, the parties will meet at a mutually convenient location to discuss, in good faith, whether Licensee is, in fact, practicing the '651 Subject Matter. If the parties conclude, in good faith, that Licensee is practicing the '651 Subject Matter, then Licensee will pay Licensor an ongoing royalty (the "'651 Royalty"), calculated according to the Royalty Schedule set out above, without regard to whether Licensor has obtained an injunction against eBay, as described in Section provided, however, (a) that the '651 Royalty will be calculated not on annual Listing Fees, but only on the portion of annual Listing Fees derived from the sale of auction-style listings that require Licensee to practice the '651 Subject Matter, and (b) that any '651 Royalties paid to Licensor will be credited against any Ongoing Royalties otherwise due Licensor such that Licensee will not, under any circumstances, be making duplicative ongoing royalty payments based on the same listing revenue.

3.4 Most Favored Status. In the event Licensor grants a license under one or more of the Subject Patents to another party which Licensee regards as more

favorable than the license granted herein, Licensee shall have the right to a license under such more favorable terms, within the Field of Use (from the effective date of such other license going forward), provided that Licensee agrees to accept all reasonably applicable other terms and conditions of such other license. For purposes of permitting Licensee to evaluate whether to accept such other license in lieu of the License granted under this Agreement, Licensor shall provide copies of such other license agreements, promptly upon their execution (but without penalty if delay is inadvertent), to outside counsel for Licensee, who agrees to maintain the same in confidence and to use the same solely for purposes of advising Licensee on whether to exercise its rights under this Section.

3.5 Reporting. As soon as Licensee's Listing Fees exceed $ 12 million on an annualized basis during any Calendar Quarter, Licensee shall send to Licensor reports of the Listing Fees within thirty (30) days following the end of each Calendar Quarter.

3.6 Payment. Each report shall be accompanied by the required payment in U.S. Dollars. For the purpose of calculating the royalties payable hereunder, respective currencies of the Listing Fees shall be converted to U.S. Dollars at the rate of exchange quoted in The Wall Street Journal in force on the last working day of the Calendar Quarter reporting period.

3.7 Record Keeping; Inspection & Audit. Licensee shall maintain complete and accurate records of the Listing Fees. These records shall be maintained for a period of at least two (2) years subsequent to Licensee's latest royalty report. Until such time as Licensee becomes obligated to provide quarterly reports to Licensor under Section 3.5, above, Licensee will provide, within 30 days after receipt of a written request

from Licensor, and not more than once per Calendar Year, a report of all Listing Fees collected by Licensee during the preceding Calendar Year. In addition, periodically during the term of this Agreement and subsequent to the expiration or termination of this Agreement, for any reason, upon 30 days prior written notice to Licensee and upon execution of a Confidentiality Agreement in Licensee's favor, Licensor's independent duly appointed Certified Public Accountant may inspect and/or audit Licensee's records that pertain to the Listing Fees during regular business hours for the purpose of verifying the completeness and accuracy of all reports to Licensor. Such inspection shall occur no more frequently than once per Calendar Year. If said audit determines that there has been a shortfall in royalties paid to Licensor in excess of five percent (5%) of the amount actually due for the period under audit, then Licensee shall reimburse Licensor for the reasonable expenses actually incurred by Licensor for the audit.

ARTICLE IV
ENFORCEMENT

4.1 Right to Enforce Subject Patents. Licensor will vigorously enforce the Subject Patents against infringers.

4.2 Should Licensee become aware of any infringement or alleged infringement of any Subject Patent, the Licensee will notify the Licensor in writing of the name and address of alleged infringer, the alleged acts of infringement, and any evidence of infringement of which Licensee is aware. Within 30 days of receipt of such notice, Licensor will advise Licensee whether Licensor will pursue legal action against such infringer. If Licensor advises Licensee that it will pursue legal action against such infringer, Licensor

will commence such action with 30 days of so advising Licensee (unless the parties mutually agree that it would be advantageous to delay commencement of such action). Licensee will cooperate fully in the prosecution of such action. Licensor will bear all costs of pursuing any action it commences (excluding costs, such as attorneys' fees, incurred by Licensee in cooperating with Licensor in the prosecution of such action). If Licensor advises Licensee that it will not pursue legal action against the infringer, then Licensor hereby empowers Licensee to commence such action itself. Licensor consents to be joined as a party to such action, will take all steps reasonably necessary to ensure that Licensee has the standing necessary to prosecute such action, and will cooperate fully in the investigation and prosecution of such claims. If Licensee elects, in its discretion, to pursue any such action, Licensee will bear all costs of pursuing such action (excluding costs, such as attorneys' fees, incurred by Licensor in cooperating with Licensee in the prosecution of such action).

4.3 Licensor will retain any damages it recovers in any action it commences against an infringer, save only damages intended to compensate for injury to Licensee which damages Licensor will remit to Licensee (after recouping its cost, including attorneys' fees, of prosecuting the action).

4.4 Licensee will share with Licensor (on a 50/50 basis) any damages it recovers in any action it commences against an infringer, save only damages intended to compensate for injury to Licensee (which damages will be retained by Licensee); provided, however, that before sharing any recovery with Licensor, Licensee may deduct its cost of prosecuting the action, including attorneys' fees, as well as the issue fee paid

to Licensor under Section 3.1 and any Ongoing Royalties and/or '651 Royalties paid to Licensor to that date under Section 3.2 and/or 3.3.

4.5 The rights and obligations established under this Article IV do not apply to any litigation commenced prior to the Effective Date of this Agreement.

ARTICLE V
OTHER PROVISIONS

5.1 Term. This Agreement, unless earlier terminated as provided under this Agreement, shall remain in full force and effect until the last claim of any Subject Patent expires or is declared invalid or unenforceeable and all appeals or administrative proceedings are final and non-appealable.

5.2 Termination for Cause.

5.2.1 If Licensor believes that Licensee has materially breached any of its obligations under this Agreement, Licensor shall promptly notify Licensee of said breach in writing, stating the nature of Licensee's breach with reasonable particularity. If Licensee fails to adequately correct such breach within twenty (20) days from the effective date of the written notice, Licensor may terminate this Agreement and the License granted hereunder by providing twenty (20) days' written notification of termination to Licensee.

5.22 Licensor may terminate this Agreement if Licensee attempts to transfer, asssign, or sublicense the Subject Patents in knowing violation of this Agreement; or if Licensee challenges or knowingly and voluntarily assists any third party in challenging the validity, enforceability or scope of the Subject Patents.

5.2.3 On notice of the termination of this Agreement, the License and rights granted in this Agreement shall

immediately revert to Licensor with no further step or action at law or equity required by Licensor. In no event shall termination of this License require Licensor to refund to Licensee payments previously made by Licensee under Article HI.

5.3 Termination by Licensee. This Agreement may be terminated by Licensee at any time with 15 days written notice to Licensor, provided, however, that in no event shall termination of this License require Licensor to refund to Licensee payments previously made by Licensee under Article III.

5.4 No Joint Venture. The relationship between the parties shall be limited to performance of their respective obligations as set forth in this Agreement. Nothing in this Agreement shall be construed to create a partnership or joint venture between the parties or to authorize either party to act as general agent for the other party, or to permit either party to restrain or otherwise bind the other party. No party shall be liable for any of the actions, omissions, or indebtedness of the other party.

5.5 Assignability and Sublicense Rights.

5.5.1 This License Agreement may be assigned by Licensee in connection with the sale of all or substantially all of its assets.

5.5.2 Licensor shall have the right to assign or otherwise transfer the Subject Patents to any third party. Licensor's rights to receive payments from Licensee under this Agreement may be assigned together with the Subject Patents. Such assignment or transfer shall not be deemed effective unless such assignee or transferee has agreed in writing to be bound by the terms and provisions of this Agreement.

5.5.3 Licensee shall be free to grant a sublicense to the Subject Patents, or any of them, within the Field of Use, to any ATC Affiliate, any one or more of the following entities (Licensee's parent companies), and/or any one or more Affiliates of each of these: ADP, Inc. (a Delaware Corporation); AutoTrader Holdings, Inc. (a Nevada Corporation, and subsidiary of Landmark Communications, Inc.); KPCB Holdings, Inc. a Kleiner, Perkins company); LTM Company, L.P. (a Virginia limited partnership, and subsidiary of Landmark Communications, Inc., through which Landmark holds its interest in Trader Publishing Company); Manheim ATC, Inc. (a Delaware corporation, and subsidiary of Cox Enterprises, Inc.); and TPI, Inc. (a Delaware corporation, and subsidiary of Cox Enterprises, Inc. through which Cox holds its interest in Trader Publishing Company) (each, a "Sublicensee"). No Sublicensee shall have the right to assign the license grant or to further sublicense the license grant.

5.5.3.1 For purposes of this Section 5.5, an "Affiliate" shall mean any corporation, firm, limited liability company, partnership or other entity that directly or indirectly controls or is controlled by or is under common control with any of the entities identified in Section 5.5.3, above. "Control" means ownership, directly or through one or more Affiliates, of 50 percent or more of the shares of stock entitled to vote for the election of directors, in the case of a corporation, or 50 percent or more of the equity interests in the case of any other type of legal entity, status as a general partner in any partnership, or any other arrangement whereby a party controls or has the right to control the board of directors or equivalent governing body of a corporation or other entity. Whether a given entity is an Affiliate for purposes of this Section 5.5.3 will be

determined at the time of the proposed sublicense; provided, however, that Licensee will not a have a right to sublicense the Subject Patents to eBay, Inc., Amazon, Inc., Yahoo, Inc., or America Online, Inc. (AOL) even if ATC, or one of the entities identified in Section 5.5.3, above, were to acquire a controlling interest in one of these companies.

5.5.3.2 Prohibited Sublicensees and Assignees. Regardless of any other provision of this Agreement, Licensee may not assign, sublicense, or grant the License granted under this Agreement or any other right to the Subject Patents, without the prior written approval of Licensor, to eBay, Inc., Amazon, Inc., Yahoo, Inc., or America Online, Inc. (AOL). Licensor's approval may be withheld for any reason or no reason at all.

5.5.4 The terms and conditions of any such sublicense, including the amount of any issue fee and/or any ongoing royalty, shall be determined by Licensee, in its discretion. However, Licensee agrees to share with Licensor, on the following basis, any issue fee or royalty fee it receives from sublicensing the Subject Patents to one or more of the Sublicensees (collectively, the "Sublicense Fees"):

5.5.4.1 Until such time, if any, as ATC has recouped, through the collection of the Sublicense Fees, the issue fee Licensee paid to Licensor under Section 3.1 and any Ongoing Royalties and/or '651 Royalties paid to Licensor to that date, ATC will pay Licensor twenty-five percent (25%) of each Sublicense Fee it collects (net of all costs, including attorneys' fees, incurred in furtherance of the applicable sublicense(s)). Thereafter, ATC will pay Licensor fifty percent (50%) of each Sublicense Fee it collects (net of all costs, including attorneys' fees, incurred in furtherance of the applicable sublicense(s)). ATC's reporting, pay-

ment, record keeping, inspection, and audit obligations with respect to the Sublicense Fees will be the same as its obligations with respect to the royalties to be paid directly by ATC to Licensor under Sections 3.5, 3.6, and 3.7, above.

5.6 No Implied License. Nothing contained in this Agreement shall be construed as granting by implication, estoppel or otherwise, any licenses, warranties (implied in fact or law) or rights other than those expressly granted herein, or creating any obligation other than those expressly granted herein.

5.7 Warranties by Licensor. Licensor represents and warrants to Licensee that as of the Effective Date hereof:

(a) Licensee does not need any license or right which is held by Licensor not already provided under this Agreement, that is necessary or useful for Licensee to operate an online auction-style service within the Field of Use.

(b) Licensor has reviewed the draft business plan for Licensee's auction-style listing service, attached hereto as Exhibit A. To Licensor's knowledge, based on Licensor's review of such business plan, and otherwise, the rights granted to Licensee under the license granted hereunder to the Core Patents are sufficient to enable Licensee to operate the contemplated online auction-style service, within the Field of Use.

(c) Licensor has the right to license the rights licensed and granted to Licensee in and to the Subject Patents under this Agreement without violating the terms of any agreement or arrangement to which Licensor is a party. Nothing in this Agreement shall be construed as a warranty or representation by Licensor or Licensee as to the validity or scope of the Subject Patents.

5.8 Indemnification. Licensor will indemnify Licensee against any costs incurred by Licensee as a result of any action on the part of Licensor a reasonably foreseeable consequence of which is the involvement of Licensee in litigation over the validity or infringement of the Subject Patents, whether as a party or as a non-party witness; provided, however, that such indemnification obligation will not exceed the amount of the issue fee paid by Licensee under Section 3.1, above, and any Ongoing Royalties and '651 Royalties paid to Licensor on or before the date the applicable indemnification payment is made. Licensor will further indemnify Licensee against costs (including reasonable attorneys' fees) incurred by it as a result of a breach by Licensor of any of its representations and warranties in this Agreement.

5.9 Notification. The parties shall notify each other in writing, by certified mail, at the following address, which may be amended from time to time upon written notification:

Licensor:

Thomas G. Woolston
Managing Member
MercExchange, LLC
9124 Potomac Ridge Road
Great Falls, Virginia 22066

Licensee:

Jim McKnight
Chief Operating Officer
AutoTrader.com, LLC
5775 Peachtree Dunwoody Drive
Suite A 200
Atlanta, GA 30342

With a copy to:

Jonathan D. Hart
Dow, Lohnes Albertson, PLLC
1200 New Hampshire Avenue, N.W.
Washington, DC 20036

5.10 Controlling Law. This Agreement shall be construed and enforced in accordance with, and shall be governed by, the laws of the State of Georgia without giving effect to the provision, policies, or principles thereof relating to choice or conflict of laws.

5.11 Severability. Any provision of this Agreement that is illegal, invalid or unenforceable in any jurisdiction shall, as to such jurisdiction, be ineffective to the extent of such illegality, invalidity or unenforceability without invalidating the remaining portions hereof or affecting the validity or enforceability of such provisions in any other jurisdiction.

5.12 Waiver. The failure of any party to enforce any provision of this Agreement, or to assert any rights with respect thereto, shall not be considered a waiver thereof or in any way affect the validity of this Agreement. The failure by any party hereto to enforce any of said provisions, rights or elections shall not prejudice said party from later enforcing or exercising the same or any other provisions, rights, of elections which it may have under this Agreement.

5.13 Integration. This Agreement contains the entire and only understanding between the parties with respect to the subject matter hereof, and supersedes all prior agreements and understandings, whether oral or written, with respect thereto. No modification or wavier of this Agreement or any of its provisions shall be binding unless in writing and signed by a duly authorized representative of each of the parties hereto.

5.14 Bankruptcy or Liquidation. The Agreement is terminable upon notice by either party in the event of the bankruptcy of the other party or the liquidation of the other party's assets.

5.15 Non-refundable. Any and all fees, payments, or royalties, made under this Agreement are non-refundable.

5.16 Headings. Headings in this Agreement are for organizational purposes only and shall not be read into the terms of this Agreement.

5.17 Marking. Licensee shall provide notice under the appropriate legal notices section of its website that the "Certain Operations of this website and the services provided by AutoTrader.com [or its successor or assignee, as appropriate] are licensed under U.S. Patent Nos. 5,845,265; 6,085,176; and 6,202,051 and pending patents."

5.18 Authority. Each of the parties entering into this Agreement represents and warrants it has full power and authority to enter into this Agreement and to perform all transactions, duties and obligations set forth herein. Each party further represents that it has had the opportunity to review the terms and conditions hereof with legal counsel. Each signatory to this Agreement on behalf of a party represents and warrants that he has the authority to execute this Agreement on behalf of that party.

5.19 Confidential. The terms of the Agreement and the details of the relationship established under the Agreement will be kept confidential unless the parties mutually agree otherwise. Notwithstanding the foregoing, Licensor may disclose the fact of this license relationship and the economic terms of the Agreement in the context of any litigation in which it may be involved to enforce its rights under the Subject Patents

or any of them and Licensee may disclose the fact of this license relationship and the economic terms of the Agreement in the context of any patent-related litigation in which it may become involved. Notwithstanding any of the foregoing, under no circumstances will Licensor disclose to any third party any of the contents of Exhibit A. The parties will diseuss in good faith the timing and content of a press release announcing that Licensee has taken a license from Licensor, but neither party will issue any such press release or other public statement about the relationship established under this Agreement without the prior written approval of the other party, both as to timing and content.

5.20 Nothing in the Agreement is to be construed as an admission by ATC that the Subject Patents are valid, enforceable, or infringed by any activity engaged in or contemplated by ATC.

5.21 Binding Agreement. This Agreement shall be binding not only upon the parties hereto, but also upon their assignees, successors, heirs, divisions, subsidiaries, officers, directors and employees.

5.22 Force Majeure. There shall be no liability on either party on account of any loss, damage, or delay occasioned or caused by strikes, riots, fires, insurrection, embargoes, failure of carriers, acts of God or of the public enemy, compliance with any law, regulation or other governmental order, or any other causes beyond the control of either party, whether or not similar to the foregoing.

5.23 Expenses. Except as provided elsewhere in this Agreement, all of the legal, accounting, and other miscellaneous expenses incurred in connection with this Agreement and the performance of the various

provisions of this Agreement shall be paid by the party who incurred the expense.

5.24 Execution in Counterparts. This Agreement may be executed in counterparts, all of which together constitute an original.

This Agreement is entered into as of the date and year first above written.

MercExchange, LLC	AutoTrader.com, LLC
By /s/ Thomas G. Woolston	By /s/ Jim McKnight
Managing Member	Chief OperatingOfficer

LICENSE AGREEMENT
By and Between
Aden Enterprises, Inc. and
MercExchange, LLC

THIS LICENSE AGREEMENT, (hereinafter the "Agreement") is entered into this 28th day of October, 1999 by and between Aden Enterprises, Inc., a California corporation ("Aden" or the "Company"), having a principal place of business at 13314 I Street, Omaha, Nebraska 68137 and MercExchange, LLC, ("MercExchange") a Delaware corporation with a principal place ofbusiness at 110 S. Payne Street, Alexandria, VA 22314. This Agreement supersedes and replaces in all respects the Agreement entered into by the parties dated January 19, 1999.

RECITALS

WHEREAS, Aden is embarking on a major development and industry initiative to build and deploy Internet Markets and Auctions that employ the pending and issued Subject Patents. Aden agrees that patent protection provides an important commercial advantage and agrees to consult and confer with MercExchange to assure a tight nexus between the commercial embodiments of the aforesaid Internet Markets and Auctions and the claims of the pending and issued Subject Patents.

WHEREAS, MercExchange desires to license the pending and issued Subject Patents subject to the terms and conditions as set forth herein.

NOW, THEREFORE, in consideration of the promises and of the mutual covenants contained herein, the parties hereby agree as follows:

Capital terms as used herein are defined in the Definition Section Below:

ARTICLE I
LICENSE TO ONLINE TRAVEL SECTOR

1.1 License. MercExchange hereby grants to Aden, during the Term of this Agreement, an exclusive License Grant to make, use and sell products and services that use the inventions disclosed and claimed in the pending and issued Subject Patents within field of use of the Online Travel Sector.

1.2. Nexus. Aden shall use best efforts to develop Internet Markets and Auctions that employ the pending and issued Subject Patents for use in the Online Travel Sector. Aden shall confer with MercExchange to assure a tight nexus between the commercial embodiment of the aforesaid Internet Markets and Auctions with the claims of the pending and issued Subject Patents.

1.3 Legal Fees. Aden shall pay all reasonable legal and administrative fees associated with the continuing prosecution and maintenance ofthe Subject Patents before the U.S. Patent and Trademark Office. Aden shall also pay all legal, administrative and filing fees associated with any Interference proceeding before the U.S. Patent and Trademark Office and any related litigation in Federal or State Court. The parties shall confer on strategies concerning the prosecution, enforcement and exploitation of the Subject Patents.

1.4 Warrants. Aden hereby grants 53 million warrants exercisable at .001 (U.S.D.) per share of restricted common stock in Aden Enterprises, Inc. exercisable on or before October 31, 2001. If at any time and from time to time after the date hereof, the Company files a Registration Statement under the Securities Act of 1933, as amended, with respect to any offering of any equity securities by the Company for its own account or for the account of any of its equity holders (other than (i) a registration on Form S-4 or S-8 or any successor form to such Forms or (ii) any registration of securities as it relates to an offering and sale to management of the Company

pursuant to any employee stock plan or other employee benefit plan, arrangement) then; as soon as practicable (but in no event less than ten days prior to the proposed date of filing such Registration Statement), the Company shall give written notice of such proposed filing to MercExchange, and such notice shall offer MercExchange the opportunity to register such number of Registrable Securities as MercExchange may request.

1.5 Aden hereby purchases 10% (ten percent) ownership of MercExchange in consideration of two notes in a total amount of $4 million, said notes payable by wire transfer wherein the first note in the amount of $1 million shall be due and paid within thirty (30) days of the effective date of this Agreement, the second note in the amount of 53 million shall be due and paid within one hundred twenty (120) days of the effective date of this Agreement. MercExchange hereby grants an option for Aden to purchase an additional 5% of MercExchange for 53,000,000 within two years of the effective date of this Agreement.

ARTICLE H
VERTICAL SECTOR LICENSE OPTION

2.1 The parties anticipate application of the aforesaid Markets and. Auctions developed under Article I of this Agreement to commercial sectors outside the Online Travel Sector. The parties hereby mutually agree to the following terms and conditions regarding these additional Vertical Sectors.

2.2 MercExchange hereby grants an option to the Company to a non-exclusive license for the pending and issued Subject Patents to additional Vertical Sectors. For each Vertical Sector the Company shall pay MercExchange an annual payment of the greater of (1) the first $50,000 of any fees collected by the Company from a third party or (2) a 1.5% (one point five percent) continuing royalty of Gross Trans-

actions generated by said Additional Vertical Sector. In the event of a joint venture, marketing agreement, acquisition or any other business combination between the Company and a third party, the Company and MercExchange shall negotiate an equity position for MercExchange in said venture, in no event shall this equity position be less that 15% (fifteen percent) on a fully diluted basis of said venture for MercExchange.

ARTICLE III
NON-MONETARY REMUNERATION

3.1 If the Subject Patents are licensed to third parties and MercExchange receives non-monetary remuneration for said license, including but not limited to, web easements, discounted or free advertisement and linking agreements, then the Company shall purchase in cash or equity said non-monetary remunerative benefit from MercExchange at one-third the fair market value for said non-monetary remunerate benefit within 60 days of the written offer of said non-monetary remuneration from MercExchange to the Company.

ARTICLE IV
ENFORCEMENT

4.1 Right to Enforce Within The Online Travel Sector. MercExchange hereby assigns a nonexclusive right to the Company to enforce the Subject Patents, in its own name, and at its own expense, in the Online Travel Sector. MercExchange agrees to cooperate and join in said enforcement action if deemed a necessary parry and enter into all further agreements necessary to enforce the Subject Patents. The Company shall reimburse MercExchange for expenses incurred by MercExchange under this section 4.1. Nothing in this section 4.1 shall confer any rights on the Company that prevents MercExchange from enforcing or continuing to enforce the Subject Patents in the name of MercExchange. If any right granted in this section 4.1 is construed so as to

prevent MercExchange from enforcing the subject Patents in the name of MercExchange against any third party then this section 4.1 shall be null and void.

4.2 Right to Recovery. The Company and MercExchange shall split 50/50 any recovery of damages or license fees relating to any such recovery in the Online Travel Sector.

4.3 Right to Enforce Subject Patents. MercExchange retains the right to enforce and control the enforcement of the Subject Patents against third parties. The Company agrees to cooperate and join in said enforcement action if deemed a necessary party.

4.4 Non-Monetary Recovery. In any enforcement proceeding to which MercExchange or the Company enjoins a third party, the Company and MercExchange shall mutually determine the value of said injunction to the Company. The Company shall pay MercExchange 25% of the value of said injunction, in cash or equity.

ARTICLE V
DEFINITIONS

5.1 Definitions. For the purpose of this Agreement only, the following terms shall have the meanings indicated:

5.1.1 The term "Subject Patents" means the following patent applications and all continuing patent applications that seek priority from:

A. U.S. Patent Application No. 08/427,820, Entitled: "Consignment Nodes"

B. U.S. Patent Application No. 08/554,704, Now U.S. Patent No. 5,845,265, Entitled: "Consignment Nodes"

C. U.S. Patent Application No. 09/203,286 (Petition for Interference with U.S. Patent No. 5,794,207) Entitled: "Consignment Nodes"

D. U.S. Patent Application No. 09/166,779, Entitled "Method and Apparatus for Facilitate Internet Commerce with Binding Offers to Sell and Binding Counter-Offers to Buy in an Electronic Market"

E. U.S. Patent Application No. 09/253,014, Entitled: "Method and Apparatus for Facilitating Electronic Commerce Through Internet Auctions"

F. U.S. Patent Application No.09/253,021, Entitled: "Method and Apparatus for Facilitating Internet Commerce Through Inter-networked Markets and Auctions"

G. U.S. Patent Application No.09/253,015, Entitled: "Methods and Apparatus for Automatically Distributing Internet Advertising"

H. U.S. Patent Application Serial No. 09/253,057, Entitled: "Method and Apparatus for Facilitating Electronic Commerce Through Two-Tiered Electronic Markets and Auctions"

I. U.S. Patent Application Serial No. 09/264,573, Entitled: "Method and Apparatus for Using Search Agents to Search Plurality of Markets for Items"

5.1.2 The term "Online Travel Sector" means the right to make, use and sell products and systems and grant access to products and systems directed to the travel service industry including car rental, hotel booking, airline tickets, cruise, rail and travel packages.

5.1.3 The term "Vertical Sector" means industry and service classifications of customary usage and categories of commerce as defined by the United States Department of Commerce eight digit SIC codes.

5.1.4 The term "Reorganization Event" means the corporate act of the Company necessary to authorize the issuance of shares under this Agreement. The Reorganizing Event shall

take place within 60 days of the execution of this Agreement, unless otherwise extended by the parties and the shares shall be tendered forthwith.

5.1.5 The term "Gross Transactions" means the gross transactional fee amount collected or earned by the Company for the operation of said Internet Markets and Auctions. The transactional fee amount for transactions under this Agreement, for the purpose of calculating this amount, shall be based on fee charged, exclusive of any freight, handling, duties, commissions, clearance network costs and taxes.

5.1.6 The term "License Grant" means the right to make, use and sell, sub-license, enforce and collect damages, subject to this Agreement, in the Online Travel Sector. The right to sublicense the Subject Patents does not apply to Priceline.com Incorporated or related entities.

5.1.7 The term "Fiscal Quarter" means any period of three consecutive months beginning on February 1, May 1, August 1, or November 1 in any year.

5.1.8 The term "Contract Year" shall means the first full twelve-month period of four consecutive fiscal quarters, beginning May 1 and ending April 30 and each like period thereafter during the term of this Agreement.

ARTICLE VI
OTHER PROVISIONS

6.1 Termination for Cause. If Aden shall materially breach any of its obligations pursuant to this Agreement and shall fail to adequately correct such breach within (2) months from the effective date of the first written notice to MercExchange prior to the payment of the consideration provided for in Section 1.5 of this Agreement, MercExchange may terminate License pursuant to section 6.7 by written notice. The termination of the license shall immediately cause the License and the membership interest and option in MercExchange to

revert to MercExchange with no further step or action at law or equity required by MercExchange. Upon payment of the consideration set forth in Section 1.5, the rights of Merc-Exchange to terminate for cause shall end.

6.2 No Joint Venture. The relationship between the parties shall be limited to performance of their respective obligations as set forth in this Agreement. Nothing in this Agreement shall be construed to create a partnership or joint venture between the parties or to authorize either party to act as general agent for the other party, or to permit either party to bind of otherwise bind the other party. No party shall be liable for any of the actions, omissions, or indebtedness of the other parry.

6.3 Assignability. Except as otherwise provided herein, the rights and licenses granted by each party to the other in this Agreement are personal to each party and may not be assigned, sub-licensed or otherwise transferred by one party without the prior written consent of the other parry. Except that Aden may assign the rights hereunder to a wholly owned subsidiary without further written consent to MereExchange.

6.4 No Implied License. Nothing contained in this Agreement shall be construed as granting by implication, estoppel or otherwise, any licenses, warranties (implied in fact or law) or rights other than those expressly granted herein, or creating any obligation other than those expressly granted herein.

6.5 MercExchange warrants and represents that the "Subject Patents" are validly issued by and duly and lawfully recorded at the U.S. Patent and Trademark Office. MercExchange further represents that it has full right and authority to grant the license to the Subject Patents granted hereunder and that said license is not in conflict with or constitute a default under any other agreement or license relating to the Subject Patents.

6.6 No Indemnification. MercExchange does not indemnify, warrant or otherwise guarantee or hold harmless Aden from enforcement and/or legal action brought by third parties. MercExchange make no warranties that any products made under this Agreement are materially fit for their purpose or comport with any other provision of the Uniform Commercial Code.

6.7 Notification. The parties shall notify each other in writing at the following address which may be amended from time to time upon written notification:

MercExchange:

Thomas G. Woolston
Managing Member
MercExchange, LLC
110 S. Payne Street
Alexandria, VA 22314

Aden:

Michael S. Luther
Aden Enterprises, Inc.
13314 I Street
Omaha, NE 68137

6.8 This Agreement shall be construed and enforced in accordance with, and shall be governed by the laws of the State of Virginia without giving effect to the provision, policies, or principles thereof relating to choice or conflict of laws.

6.9 Severability. Any provision of this Agreement that is illegal, invalid or unenforceable in any jurisdiction shall, as to such jurisdiction, be ineffective to the extent of such illegality, invalidity or unenforceability without invalidating the remaining portions hereof or affecting the validity or enforceability of such provisions in any other jurisdiction.

6.10 Waiver. The Failure of any party to enforce any of the provision of this Agreement , or of any rights with respect thereto, shall not be considered a wavier thereof or in any way affect the validity of this Agreement The Failure by any party hereto to enforce any of said provisions, rights or elections shall not prejudice said party from later enforcing or exercising the same or any other provisions, rights, of elections which it may have under this Agreement

6.11 Integration. This Agreement contains the entire and only understanding between the parties with respect to the subject matter hereof, and supersedes all prior agreement and understandings, whether oral or written, with respect thereto. No modification or wavier of this Agreement or any of its provisions shall be binding unless in writing and signed by a duly authorized representative of each of the parties hereto.

6.12 Bankruptcy or liquidation. The License(s) granted hereunder shall immediately revert to MercExchange if the Company seeks protection under the Bankruptcy laws or is subject to liquidation under the laws of the United States.

6.13 Payments. Aden agrees to pay MercExchange, in addition to the compensation in sections 1.3, 1.4, and 1.5, the sum of 535,000. MercExchange acknowledges receipt of this payment.

6.14 Non-refundable. All funds, payments and distributions made hereunder are non-refundable unless otherwise stipulated in this Agreement.

6.15 Within forty-five (45) days following the end of each Fiscal Quarter, beginning with the first Fiscal Quarter in which Company commences activity in any additional Vertical Sector, Company shall send to MercExchange reports of the Gross Transactions imported or sold by Aden, in the preceding Fiscal Quarter, showing their respective descriptions, total quantities for transaction, and the sale price of any systems licensed hereunder.

6.16 Each report shall be accompanied by the required payment in U.S. Dollars. For the Purpose of calculating the royalties payable hereunder, respective currencies of the Gross Transactions shall be converted to U.S. Dollars at the rate of exchange quoted in The Wall Street Journal in force on the last working day of the period for which payment of royalty is being made.

6.17 The Company shall maintain complete and accurate records of the Gross Transactions manufactured, imported or sold under this Agreement, showing their respective descriptions, model numbers, quantities, and calculations of unit royalties dues and payable thereon. These records shall be maintained for a period of at least three (3) years subsequent to Company's latest quarterly royalty report. Periodically during the term of this Agreement and subsequent to the expiration or termination of this Agreement for any reason, upon 30 days prior written notice to Company and upon execution of a confidentiality Agreement in Company's favor, MercExchange's independent duly appointed Certified Public Accountant may inspect Company's records which pertain to Gross Transactions during regular business hours for the purpose of verifying the completeness and accuracy of all reports to MercExchange. Such inspection shall occur no more frequently than once any Contract Year. If said audit determines that there has been a shortfall in royalties paid to MercExchange in excess of three percent (3%) of the amount actually due for the period under audit, then Company shall reimburse MercExchange for the reasonable expenses actually incurred by it for the audit.

6.18 Headings and section titles are for organization purposes only and shall have no effect on the interpretation of this Agreement.

6.19 All fees payable hereunder, such as legal fees for continuing patent prosecution, shall be tendered by the Company within thirty (30) days of receipt of notice from MercExchange.

6.20 Remedy for Breach. If the Company materially breaches any condition of this Agreement and does not cure said breach within 60 days of notice of material breach, then all licenses granted hereunder shall immediately become null and void and these licenses, membership interest and option in Merc-Exchange shall immediately revert to MercExchange, or its lawful successor in interest.

6.21 This Agreement shall be binding to all parties and may be executed in part by facsimile.

This Agreement is entered into the date and year first above written.

Aden Enterprises, Inc.

By /s/ MichaelS. Luther
MICHAEL S. LUTHER
President & Chief Executive Officer

MarcExchange, LLC

By /s/ Thomas G. Woolston
THOMAS G. WOOLSTON
Managing Member

LICENSE AGREEMENT
By and Between
Navlet.com, Inc. and
MercExchange, LLC

This LICENSE AGREEMENT, (hereinafter the "Agreement") is entered into this 1st day of March 2000 by and between Navlet.com, Inc., ("Navlet" or the "Company") a Nevada corporation, having a principal place of business at 114 North Alfred Street, Alexandria, Virginia 22314, and MercExchange, LLC, ("MercExchange"), a limited liability company under Virginia law, having a principal place of business at 114 North Alfred Street, Alexandria, Virginia 22314.

RECITALS

WHEREAS, Navlet is embarking on a major development and industry initiative to build and deploy systems in the field of Infrastructure Provider products and services that employ the Subject Patents; and

WHEREAS, Navlet understands that patent protection provides an important commercial advantage and agrees to consult and confer with MercExchange to assure a tight nexus between the commercial embodiments of the aforesaid Infrastructure Provider products and services and the claims of the Subject Patents; and

WHEREAS, MercExchange desires to license Navlet to the Subject Patents subject to the terms and conditions as set forth herein;

NOW, THEREFORE, in consideration of the promises and of the mutual covenants contained herein, the parties hereby agree to the following terms and conditions.

ARTICLE I
DEFINITIONS

1.1. Definitions. For the purpose of this Agreement only, the following terms shall have the meanings indicated.

1.2. The term "Subject Patents" means the following patents, patent applications and any and all continuing patent applications:

A. U.S. Patent Application No. 08/427,820, Entitled "Consignment Nodes"

B. U.S. Patent Application No. 08/554,704, Now U.S. Patent No. 5,845,265, Entitled "Consignment Nodes"

C. U.S. Patent Application No. 09/203,286 (Petition for Interference with U.S. Patent No. 5,794,207) Entitled "Consignment Nodes"

D. U.S. Patent Application No. 09/166,779, Entitled "Method and Apparatus for Facilitate Internet Commerce with Binding Offers to Sell and Binding Counter-Offers to Buy in an Electronic Market"

E. U.S. Patent Application No. 09/253,014, Entitled "Method and Apparatus for Facilitating Electronic Commerce Through Internet Auctions"

F. U.S. Patent Application No. 09/253,021, Entitled "Method and Apparatus for Facilitating Internet Commerce Through Inter-networked Markets and Auctions"

G. U.S. Patent Application No. 09/253,015, Entitled "Methods and Apparatus for Automatically Distributing Internet Advertising"

H. U.S. Patent Application No. 09/253,057, Entitled "Method and Apparatus for Facilitating Electronic Commerce Through Two-Tiered Electronic Markets and Auctions"

I. U.S. Patent Application No. 09/264,573, Entitled "Method and Apparatus for Using Search Agents to Search Plurality of Markets for Items"

1.3. The term "Infrastructure Provider Sector" means hardware and/or software facilities for bid/ask and/or dynamic pricing systems.

1.4. The term "Gross Transactions" means the gross transactional revenues collected or earned by the Company within the Infrastructure Provider Sector. The transactional revenues under this Agreement, for the purpose of calculating that amount, shall be based on the actual amount charged, exclusive of any freight, handling, duties, commissions, clearance network costs and taxes.

1.5. The term "Calendar Quarter" means any period of three consecutive months beginning on January 1, April 1, July 1, or October 1 in any year.

ARTICLE II
LICENSE TO INFRASTRUCTURE PROVIDER SECTOR

2.1. License. MercExchange hereby grants to Navlet, during the Term of this Agreement, a nonexclusive License Grant, with no right of sublicense, to make and use the inventions disclosed and claimed in the Subject Patents within the Infrastructure Provider Sector field of use. The License grant includes, without limitation, the right to make and use hardware and/or software resources for bid/ask and dynamic pricing systems as an application service provider. All other rights not expressly granted hereunder are retained by MercExchange.

2.2. Nexus. Navlet shall use best efforts to develop Infrastructure Provider Sector products and services that employ the subject matter of the Subject Patents. Navlet shall confer with MercExchange to assure a tight nexus between the commercial embodiments of the aforesaid Infrastructure Provider Sector products and services with the claims of the Subject Patents.

ARTICLE III
STOCK, ROYALTY AND RECORDS

3.1. Stock. As partial consideration for the license provided herein, Navlet hereby agrees to tender, within 5 days of the execution of this Agreement, 15% (fifteen percent) of its shares o MercExchange.

3.2. Royalty. Navlet shall further pay MercExchange an annual payment of the greater of (1) the first 550,000 of the Gross Transactions collected or earned by the Company or (2) 2.5% (1.5 percent) continuing royalty of Net Revenue Transactions generated in the Infrastructure Provider Sector.

3.3. Reporting. Within thirty (30) days following the end of each Calendar Quarter, beginning with the first Calendar Quarter in which the Company commences activity in the Infrastructure Provider Sector, the Company shall send to MercExchange reports of the Gross Transactions collected or earned by the Company in the preceding Calendar Quarter, providing descriptions or identifying characteristics of the goods or other products or services sold, total quantities for the transaction, and the sale price of the goods or other products or services sold hereunder.

3.4. Payment. Each report shall be accompanied by the required payment in U.S. Dollars. For the purpose of calculating the royalties payable hereunder, respective currencies of the Gross Transactions shall be convened to U.S. Dollars at the rate of exchange quoted in The Wall Street Journal in

force on the last working day of the period for which payment of royalty is being made.

3.5. Record Keeping; Inspection & Audit. The Company shall maintain complete and accurate records of the Gross Transactions collected or earned under this Agreement, showing their respective descriptions and identifying characteristics, including model numbers, if any, quantities, and calculations of unit royalties due and payable thereon. These records shall be maintained for a period of at least three (3) years subsequent to Company's latest quarterly royalty report. Periodically during the term of this Agreement and subsequent to the expiration or termination of this Agreement, for any reason, upon 30 days prior written notice to Company and upon execution of a Confidentiality Agreement in Company's favor, MercExchange's independent duly appointed Certified Public Accountant may inspect and/or audit Company's records that pertain to the Gross Transactions during regular business hours for the purpose of verifying the completeness and accuracy of all reports to MercExchange. Such inspection shall occur no more frequently than once per calendar year. If said audit, determines that there has been a shortfall in royalties paid to MercExchange in excess of three percent (3%) of the amount actually due for the period under audit, then Company shall reimburse MercExchange for the reasonable expenses actually incurred by MercExchange for the audit.

ARTICLE IV
ENFORCEMENT

4.1. Right to Enforce Subject Patents. MercExchange retains the sole right to enforce and control the enforcement of the Subject Patents against all other third parties not licensed hereunder. The Company agrees to cooperate and join in said enforcement action if deemed a necessary party.

4.2. Non-Monetary Remuneration. If the Subject Patents are Licensed to third parties and MercExchange receives as con-

sideration for said third-party License non-monetary remuneration, including but not limited to the placement of a Navlet navigational applet, participation in or providing content to the Navlet system, a web easement, discounted or free advertising, a linking agreement, then Navlet shall purchase in cash or equity said non-monetary remunerative benefit from MercExchange at (1/3) one-third the fair market value for said non-monetary remunerate benefit within 30 days of the written offer of said non-monetary remuneration from MercExchange to Navlet.

ARTICLE V
OTHER PROVISIONS

5.1. Term. This Agreement, unless earlier terminated as provided under this Agreement, shall remain in full force and effect until the last claim of any patent included in the Subject Patents expires.

5.2. Termination for Cause. If MercExchange believes that Navlet has materially breached any of its obligations under this Agreement, MercExchange shall promptly notify Navlet of said breach in writing with reasonable particularity. If Navlet fails to adequately correct such breach within two (2) months from the effective date of the first written notice, MercExchange may terminate this Agreement and the License by providing written notification of termination to Navlet. The termination of the License shall immediately cause the License to revert to MercExchange with no further step or action at law or equity required by MercExchange.

5.3. No Joint Venture. The relationship between the parties shall be limited to performance of their respective obligations as set forth in this Agreement. Nothing in this Agreement shall be construed to create a partnership or joint venture between the parties or to authorize either party to act as general agent for the other party, or to permit either party to restrain or otherwise bind the other party. No party shall be

liable for any of the actions, omissions, or indebtedness of the other party.

5.4. Assignability. Except as otherwise provided herein, the rights and licenses granted by MercExchange to Navlet in this Agreement are personal and may not be assigned, sub-licensed or otherwise transferred by Navlet without the prior written consent of MercExchange.

5.5. No Implied License. Nothing contained in this Agreement shall be construed as granting by implication, estoppel or otherwise, any licenses, warranties (implied in fact or law) or rights other than those expressly granted herein, or creating any obligation other than those expressly granted herein.

5.6. Patent Validity. Nothing in this Agreement shall be construed as a warranty or representation by MercExchange as to the validity or scope of the Subject Patents or that the exercise of the license rights under the Subject Patents will not infringe upon the rights of any third party.

5.7. No Indemnification. MercExchange does not indemnify, warrant or otherwise guarantee or hold harmless Navlet from enforcement and/or legal action brought by any third party.

5.8. Notification. The parties shall notify each other in writing, by certified mail, at the following address which may be amended from time to time upon written notification:

MercExchange:

Thomas G. Woolston
Managing Member
MercExchange, LLC
114 North Alfred Street
Alexandria, Virginia 22314

Navlet:

Michael S. Luther
For the Board of Directors
Navlet.com, Inc.
114 North Alfred Street
Alexandria, Virginia 22314

5.9. Controlling Law. This Agreement shall be construed and enforced in accordance with, and shall be governed by the laws of the Commonwealth of Virginia without giving effect to the provision, policies, or principles thereof relating to choice or conflict of laws.

5.10. Severability. Any provision of this Agreement that is illegal, invalid or unenforceable in any jurisdiction shall, as to such jurisdiction, be ineffective to the extent of such illegality, invalidity or unenforceability without invalidating the remaining portions hereof or affecting the validity or enforceability of such provisions in any other jurisdiction.

5.11. Waiver. The failure of any party to enforce any of the provision of this Agreement, or of any rights with respect thereto, shall not be considered a waiver thereof or in any way affect the validity of this Agreement. The failure by any party hereto to enforce any of said provisions, rights or elections shall not prejudice said party from later enforcing or exercising the same or any other provisions, rights, of elections which it may have under this Agreement.

5.12. Integration. This Agreement contains the entire and only understanding between the parties with respect to the subject matter hereof, and supersedes all prior agreement and understandings, whether oral or written, with respect thereto. No modification or wavier of this Agreement or any of its provisions shall be binding unless in writing and signed by a duly authorized representative of each of the parties hereto.

5.13. Bankruptcy or liquidation. The license granted hereunder shall immediately revert to MercExchange if the Company seeks protection under the Bankruptcy laws or is subject to liquidation under the laws of the United States.

5.14. Non-refundable. All funds, payments, royalties, and distributions made by Navlet to MercExchange hereunder are non-refundable.

5.15. Remedy for Breach. If the Company materially breaches any condition of this Agreement and does not cure said breach within two (2) months notice of the material breach, then all licenses granted hereunder shall immediately become null and void and these licenses shall immediately revert to MercExchange, or its lawful successor in interest. MercExchange retains all rights to pursue any and all available remedies for any material breach of this Agreement, whether in law or in equity.

5.16. This Agreement shall be binding to all parties and may be executed in part by facsimile.

This Agreement is entered into the date and year-first above written.

MarcExchange, LLC	Navlet.com, Inc.
By /s/ Thomas G. Woolston Managing Member	By /s/ Michael S. Luther For the Board of Directors

LICENSE AGREEMENT
By and Between
Leftbid.com, Inc. and MercExchange, LLC

THIS LICENSE AGREEMENT, (hereinafter the "Agreement") is entered into this 8th day of October, 1999 by and between Leftbid.com, Inc, ("Leftbid" or the "Company") a Nevada corporation, having a principal place of business of 590 Madison Avenue, New York, New York 10022, and MercExchange, LLC, ("MercExchange, a limited liability company under Delaware law, having a principal place of business at 114 N. Alfred Street, Alexandria, VA 22314,

RECITALS

WHEREAS, Leftbid is embarking on a major development and industry initiative to build and deploy Internet Markets and Auctions in the field of fine art and artifacts that employ the pending and issued Subject Patents; and

WHEREAS, Leftbid agrees that patent protection provides an important commercial advantage and agrees to consult and confer with MercExchange to assure a tight nexus between the commercial embodiments of the aforesaid Internet Markets and Auctions and the claims of the pew and issued Subject Patents; and

WHEREAS, MercExchange desires to license Leftbid to the pending and issued Subject Patents subject to the terms and conditions as set forth herein;

NOW, THEREFORE, in consideration of the promises and of the mutual covenants contained herein, the parties hereby agree as follows:

ARTICLE I
LICENSE TO FINE ART SECTOR

1.1 License. MercExchange hereby grants to Leftbid, during the Term of this Agreement, a nonexclusive License Grant, with no right of sublicense, to make and use the

inventions disclosed and claimed in the pending and issued Subject Patents within the field of use of the Fine Art Sector. All other rights not expressly granted hereunder are retained by MercExchange.

1.2 Nexus. Leftbid shall use best efforts to develop Internet Markets and Auctions that employ the subject matter of the pending and issued Subject Patents for use in the field of use of the Fine Art Sector. Leftbid shall confer with MercExchange to assure a tight nexus between the commercial embodiments of the aforesaid Internet Markets and Auctions with the claims of the pending and Issued Subject Patents.

1.3 Stock. As partial consideration for the license provided herein, Leftbid hereby tenders 7.5% (7.5 percent) of its shares to MercExchange, within 5 days of the execution of this Agreement.

1.4 Royalty. Leftbid shall further pay MercExchange an annual payment of the greater of (1) the first $50,000 of the Gross Transactions collected or earned by the Company or (2) a 1.5% (1.5 percent) continuing royalty of the Gross Transactions generated in the Fine Art Sector, in accordance with Article II below.

ARTICLE II
PAYMENT OF ROYALTY AND RECORDS

2.1 Within thirty (30) days following the end of each Calendar Quarter, beginning with the first Calendar Quarter in which the Company commences activity in the Free Art Sector, the Company shall send to MercExchange reports of the Gross Transactions collected or earned by the Company in the preceding Calendar Quarter, providing descriptions or identifying characteristics of the goods or other products sold, total quantities for the transaction, and the sale price of the goods or other products sold hereunder.

2.2 Each report shall be accompanied by the required payment in U.S. Dollars. For the purpose of calculating the

royalties payable hereunder, respective currencies of the Gross Transactions shall be converted to U.S. Dollars at the rate of exchange quoted in The Wall Street Journal in force on the last working day of the period for which payment of royalty is being made.

2.3 The Company shall maintain complete and accurate records of the Gross Transactions collected or earned under this Agreement, showing their respective descriptions and identifying characteristics, including model numbers, if any, quantities, and calculations of unit royalties due and payable thereon. These records shall be maintained for a period of at least three (3) years subsequent to Company's latest quarterly royalty report. Periodically during the term of this Agreement and subsequent to the expiration or termination of this Agreement, for any reason, upon 30 days prior written notice to Company and upon execution of a Confidentiality Agreement in Company's favor, MercExchange's independent duly appointed Certified Public Accountant may inspect Company's records which pertain to the Gross Transactions during regular business hours for the purpose of verifying the completeness and accuracy of all reports to MercExchange. Such inspection shall occur no more frequently than once any calendar year. If said audit determines that there has been a shortfall in royalties paid to MercExchange in excess of three percent (3%) of the amount actually due for the period under audit, then Company shall reimburse MercExchange for the reasonable expenses actually incurred by it for the audit.

ARTICLE III
ENFORCEMENT

3.1 Right to Enforce Subject Patents. MercExchange retains the sole right to enforce and control the enforcement of the Subject Patents against all other third parties not licensed hereunder. The Company agrees to cooperate and join in said enforcement action if deemed a necessary party.

ARTICLE IV
DEFINITIONS

4.1 Definitions. For the purpose of this Agreement only, the following terms shall have the meanings indicated:

4.1.1 The term "Subject Patents" means the following patents, patent applications and any and all continuing patent applications:

A. U.S. Patent Application No. 08/427,820, Entitled: "Consignment Nodes"

B. U.S. Patent Application No. 08/554,704, Now U.S. Patent No. 5,845,265, Entitled: "Consignment Nodes"

C. U.S. Patent Application No. 09/203,236 (Petition for Interference with U.S. Patent No. 5,794,207) Entitled "Consignment Nodes"

D. U.S. Patent Application No. 09/166,779, Entitled "Method and Apparatus for Facilitate Internet Commerce with Binding Offers to Sell and Binding Counter-Offers to Buy in an Electronic Market"

E. U.S. Patent Application No. 09/253,014, Entitled: "Method and Apparatus for Facilitating Electronic Commerce Through Internet Auctions"

F. U.S. Patent Application No. 09/253,021, Entitled: "Method and Apparatus for Facilitating Internet Commerce Through Inter-networked Markets and Auctions"

G. U.S. Patent Application No. 09/253,015, Entitled: "Methods and Apparatus for Automatically Distributing Internet Advertising"

H. U.S. Patent Application No. 09/253,057, Entitled: "Method and Apparatus for Facilitating Electronic

Commerce Through Two-Tiered Electronic Markets and Auctions"

I. U.S. Patent Application No. 09/264,573, added: "Method and Apparatus for Using Search Agents to Search Plurality of Markets for Items"

4.1.2 The term "Fine Art Sector" means the right to make and use and the inventions claimed and disclosed in the Subject Patents relating to the Internet Market and Auctions in the fine art and artifacts market, including, without limitation, paintings, sculptures, valuable artifacts and antiques.

4.1.3 The term "Gross Transactions" means the gross transactional revenues collected or earned by the Company for the operation of said Internet Markets and Auctions in the Fine Art Sector. The transactional revenues under this Agreement, for the purpose of calculating that amount, shall be based on the actual amount charged, exclusive of any freight, handling, duties, commissions, clearance network costs and taxes.

4.1.4 The term "License Grant" means the right to make and use the inventions claimed and disclosed in the Subject Patents in the Fine Art Sector.

4.1.5 The term "Calendar Quarter" means any period of three consecutive months beginning on January 1, April 1, July 1, or October 11 in any year.

4.1.6 The "Term" of this Agreement, unless earlier terminated as provided under this Agreement, shall remain in fun force and effect until the last claim of any patent included in the Subject Patents expires.

ARTICLE V
OTHER PROVISIONS

5.1 Termination for Cause. If Leftbid shall materially breach any of its obligations under this Agreement and shall fail to adequately correct such breach within two (2) months from the effective date of the first written notice to Leftbid, Merc-

Exchange may terminate License pursuant to the notice provision below. The termination of the license shall immediately cause the License to revert to MercExchange with no further step or action at law or equity required by MercExchange.

5.2 No Joint Venture. The relationship between the parties shall be limited to performance of their respective obligations as set forth in this Agreement. Nothing in this Agreement shall be construed to create a partnership or joint venture between the parties or to authorize either party to act as general agent for the other party, or to permit either party to restrain or otherwise bind the other party. No party shall be liable for any of the actions, omissions, or indebtedness of the other party.

5.3 Assignability Except as otherwise provided herein, the rights and licenses granted by MercExchange to Leftbid in this Agreement are personal and may not be assigned, sub-licensed or otherwise transferred by Leftbid without the prior written consent of MercExchange.

5.4 No Implied License. Nothing contained in this Agreement shall be construed as granting by implication, estoppel or otherwise, any licenses, warranties (implied in fact or law) or rights other than those expressly granted herein, or creating any obligation other than those expressly granted herein.

5.5 Patent Validity. Nothing in this Agreement shall be construed as a warranty or representation by MercExchange as to the validity or scope of the Subject Patents or that the exercise of the license rights under the Subject Patents will not infringe upon the rights of any Third Party.

5.6 No indemnification. MercExchange does not indemnify, warrant or otherwise guarantee or hold harmless Leftbid from enforcement and/or legal action brought by any Third Party.

5.7 Notification. The parties shall notify each other in writing, by certified mail, at the following address which may be amended from time to time iron -widen notification:

MercExchange:

Thomas G. Woolston
Managing Member
MercExchange, LLC
114 N. Alfred Street
Alexandria, VA 22314

Leftbid:

Mark Borghi
Leftbid.com, Inc.
590 Madison Avenue
New York, NY 10022

5.8 Controlling Law. This Agreement shall be construed and enforced in accordance with, and shall be governed by the laws of the Commonwealth of Virginia without giving effect to the provision, policies, or principles thereof relating to choice or conflict of laws.

5.9 Severability. Any provision of this Agreement that is illegal, invalid or unenforceable in any jurisdiction shall, as to such jurisdiction, be ineffective to the extent of such illegality, invalidity or unenforceability without invalidating the remaining portions hereof or affecting the validity or enforceability of such provisions in any other jurisdiction.

5.10 Waiver. The failure of any party to enforce any of the provision of this Agreement, or of any rights with respect thereto, shall not be considered a waiver thereof or in any way affect the validity of this Agreement. The failure by any party hereto to enforce any of said provisions, rights or elections shall not prejudice said party from later enforcing or exercising the same or any other provisions, rights of elections which it may have under this Agreement.

5.11 Integration. This Agreement contains the -entire and only understanding between the parties with respect to the subject matter hereof, and supersedes all prior agreement and understandings, whether oral or written, with respect thereto. No modification or wavier of this Agreement or any of its provisions shall be binding unless in writing and signed by aduly authorized representative of each of the parties hereto.

5.12 Bankruptcy or liquidation. The license granted hereunder shall immediately revert to MercExchange if the Company seeks protection under the Bankruptcy laws or is subject to liquidation under the laws of the United States.

5.13 Non-refundable. AR funds, payments, royalties, and distributions made by Leftbid to MercExchange hereunder are non-refundable.

5.14 Remedy for Breach. If the Company materially breaches any condition of this Agreement and does not cure said breech within two (2) months notice of the material breach, then all liceases granted hereunder shall immediately become null and void and these licenses shall immediately revert to MercExchange, or its lawful successor in interest MercExchange retains all rights to pursue any and all available remedies for any material breach of this Agreement, whether in law or in equity.

5.15 This Agreement shall be binding to all parties and may be executed in part by facsimile. This Agreement is entered into the date and year first above written

Leftbid.com, Inc.
By /s/ MARK BORGHI
Mark Borghi
President & Chief Exective Officer

MercExchange, LLC
By /s/ THOMAS G. Woolston
Thomas G. Woolston
Manager Member

SETTLEMENT AGREEMENT

This Agreement is entered into this 1st of June, 2001 (the "Effective Date") by and among MERCEXCHANGE, L.L.C., a Virginia Limited Liability Company, with its principal place of business at 116 South Patrick Street, Alexandria, Virginia (hereinafter referred to as "MercExchange") and GOTO.COM, NC., a Delaware corporation with its principal place of business at 74 North Pasadena Avenue, Pasadena, California (hereinafter referred to as "GoTo.com").

WHEREAS MercExchange and GoTo.com are parties to a lawsuit currently pending in the United States District Court for the Eastern District of Virginia, Civil Action No.: 2:00CV826 (the "Action"), wherein MercExchange claims that GoTo.com has infringed and is infringing various claims of U.S. Patent No. 6,085,176 (the "'176 Patent"), and wherein MercExchange is seeking a permanent injunction and damages for that alleged infringement, and wherein GoTo.com denies liability for the matters alleged;

WHEREAS MercExchange has alleged that GoTo.com also is infringing U.S. Patent No. 5,845,265, and wherein GoTo.com denies liability for the matters alleged;

WHEREAS MercExchange and GoTo.com desire to compromise and settle completely the disputes between them, on a worldwide basis, upon the terms and in the manner provided herein;

NOW THEREFORE, in consideration of the promises, the mutual covenants and agreements hereinafter set forth, and for other good and valuable consideration, the receipt and

sufficiency of which are hereby acknowledged, MercExchange and GoTo.com agree as follows:

1. As used herein, "Designated MercExchange Patents" shall mean:

(i) all patents and applications identified in the attached Appendix A;

(ii) any and all other patents issuing from and/or claiming priority to, directly or indirectly, any patent application identified' by serial number in the attached Appendix A, wherever and whenever issued;

(iii) any and all other patents issuing from and/or claiming priority to, directly or indirectly, any patent application filed on or before the date of this Agreement on behalf of MercExchange and/or naming Thomas Woolston as an inventor, wherever and whenever issued, excluding L.T.S. Patent No. 6,162,123 and all continuing patent applications based thereon; and

(iv) any reissues, reexaminations, extensions, and foreign counterparts to the patents identified in (i)-(iii).

2. MercExchange, for itself and for ail persons or entities claiming under, by or through them, hereby folly and unconditionally releases and forever discharges GoTo.com, its directors, officers, members, employees, attorneys, consultants, agents, servants, distributors, licensees, representatives, customers, insurers, subsidiaries, division(s), affiliates, or its former parent, regarding any and all claims, demands, damages and causes of action of whatever kind or nature, whether in law or equity, whether known or unknown, developed or undeveloped, asserted or unasserted, that MercExchange may have or may have had against them, from the beginning of time through the Effective Date, other than

those obligations required to be performed under this Agreement. Insofar as directors, officers, members, employees, attorneys, consultants, agents, servants, distributors, licensees, representatives, customers, insurers, affiliates, and its former parent are concerned, this release is limited to activities related to products and/or services provided by GoTo.com or to acts taken by or on behalf of GoTo.com. MercExchange hereby expressly waives and relinquishes all rights and benefits to claims which MercExchange does not know or suspect to exist in MercExchange's favor at the time of executing this release, from the beginning of time through the Effective Date, other than those obligations required to be performed under this Agreement, including those, which, if known by MercExchange would have materially affected MercExchange's settlement with GoTo.com. MercExchange hereby waives the provisions of Section 1542 of the California Civil Code, which states: A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM, MUST HAVE MATERIALLY AFFECTED HIS SETTLEMENT WITH THE DEBTOR.

3. GoTo.com, for itself and for all persons or entities claiming under, by or through them, hereby fully and unconditionally releases and forever discharges MercExchange, its directors, officers, members, employees, attorneys, consultants, agents, servants, distributors, licensees, representatives, customers, insurers, its former Delaware parent, subsidiaries, divisions, or affiliates, regarding any and all claims, demands, damages and causes of action of whatever kind or nature, whether in law or equity, whether known or unknown, developed or undeveloped, asserted or unasserted, that GoTo.com may have or may have had against them, from the beginning of time through the Effective Date, other than those obligations required to be performed under this Agreement.

Insofar as directors, officers, members, employees, attorneys, consultants, agents, servants, distributors, licensees, representatives, customers, insurers, its former Delaware parent, and affiliates are concerned, this release is limited to activities related to products and/or services provided by MercExchange or to acts taken by or on behalf of MercExchange. GoTo.com hereby expressly waives and relinquishes all rights and benefits to claims which GoTo.com does not know or suspect to exist in GoTo.com's favor at the time of executing this release, from the beginning of time through the Effective Date, other than those obligations required to be performed under this Agreement, including those, which, if known by GoTo.com would have materially affected GoTo.com's settlement with MercExchange. GoTo.com hereby waives the provisions of Section 1542 of the California Civil Code, which states: A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM, MUST HAVE MATERIALLY AFFECTED HIS SETTLEMENT WITH THE DEBTOR.

4. If GoTo.com timely makes the Settlement Payment due under Paragraph 9, then MercExchange and GoTo.com shall cause to be dismissed, with prejudice, all claims between them now pending in the Action. MercExchange GoTo.com hereby agree that each party shall bear its own attorneys' fees, costs and other expenses in connection with the Action and this Agreement. The parties hereby authorize their respective counsel to execute the Stipulation of Dismissal in the form attached hereto as Exhibit A, and to deliver it to Jerrold G. Weinberg, Weinberg Sc Stein, 1825 Dominion Tower, Norfolk, VA 23514 (the "Escrow Agent"). The Escrow Agent shall hold the Stipulation of Dismissal until such time as he is notified by MercExchange that the Settlement Payment due under Paragraph 9 has been timely made; thereupon the Escrow Agent shall tender such Stipu-

lation of Dismissal to counsel for GoTo.com for filing with the Court.

5. If GoTo.com does not timely make the full Settlement Payment due under Paragraph 9, then GoTo.com consents to the entry of judgment, in the Action, in the form attached hereto as Exhibit B (the "Consent Judgment"). The parties hereby authorize their respective counsel to execute the Consent Judgment and to deliver it to the Escrow Agent. MercExchange shall promptly notify the Escrow Agent upon receipt of the Settlement Payment due under Paragraph 9. The Escrow Agent shall hold the Consent Judgment until such time as he is notified by MercExchange that the Settlement Payment due under Paragraph 9 has not been timely made; thereupon the Escrow Agent shall tender such Consent Judgment to counsel for MercExchange for filing with the Court. Once the Consent Judgment has been entered in the Action, MercExchange may commence proceedings to enforce the Consent Judgment.

6. MercExchange, for itself and its successors and assigns, covenants never to commence, prosecute or file any claim or cause of action relating to any of the Designated MercExchange Patents against GoTo.com. MercExchange also covenants never to commence, prosecute or file any claim or cause of action relating to the Designated MercExchange Patents against the directors, officers, attorneys, or employees of GoTo.com for any acts conducted in their authorized capacities with or for GoTo.com. The covenants specified in this Paragraph 6 are personal to GoTo.com, and its directors, officers, attorneys and employees, respectively, and are not assignable or transferable. This covenant remains in full force and effect in the event GoTo.com effects a corporate name change in which no change of control occurs.

6.1 MercExchange, for itself and its successors and assigns, covenants never to commence, prosecute or file any claim or cause of action relating to any of the Designated

MercExchange Patents against GoTo.com, its affiliates, subsidiaries, divisions, customers, distributors, licensees, consultants, insurers, agents, servants and representatives for making, using, selling, or offering to sell the products or services of GoTo Search. As used herein, "GoTo Search" means any capability, process, tool, database, information repository or accounting mechanism, software, network, computer, server or service of GoTo.com that maintains and/or makes available information and/or data that can be searched or queried, modified or stored, and wherein advertisers pay or bid for placement in the search results, and which may offer other supplemental search results, and all extensions, improvements and updates which perform substantially the same function as the foregoing. For the purpose of this Agreement, an "affiliate" is a person or entity, that directly or indirectly, through one or more intermediaries, controls, or is controlled by, or is under common control with, GoTo.com.

6.2 Without limiting the rights specified in Paragraphs 6 and 6.1, MercExchange, for itself and its successors and assigns, covenants never to commence, prosecute or file any claim or cause of action relating to any of the Designated MercExchange Patents against GoTo.com, its affiliates, subsidiaries, divisions, customers, distributors, licensees, consultants, insurers, agents, servants and representatives for making, using, selling, or offering for sale, any product and/or service developed, provided or acquired by GoTo.com. The covenant of this Paragraph 6.2 does NOT include any product, apparatus, system, method or service that is covered by one or more claims of U.S. Patent No. 6,202,051 ("the '051 Patent") or any claims of any subsequently issued patent related to the '051 Patent that are directed to any product, apparatus, system, method or service involving:

(i) directly performing or hosting online auctions, including, by way of example only, online auctions

similar to those currently conducted or hosted by eBay.com, Inc., and presently located at the URL www.ebay.com;

(ii) directly performing or hosting "buy it now" online auctions with a fixed price purchase option, including, by way of example only, systems similar to those currently conducted by eBay.com, Inc., and presently located at the URL www.ebay.com;

(iii) directly performing or hosting "Name your price" online transactional systems in which a buyer offers a fixed price for a product or service, including, by way of example only, systems similar to those currently conducted by Priceline.com, Inc. and presently located at the URL www.priceline.com; or

(iv) directly performing or hosting Fixed offer consumer-to-consumer transactional online systems, including by way of example, systems similar to those currently conducted by Half.com, Inc., and presently located at the URL www.half.com.

The covenant in this Paragraph 6.2 does not apply to any product or service (other than any product and/or service developed, provided or acquired by GoTo.com as set forth in this paragraph) which the affiliate, subsidiary, division, customer, distributor, licensee, consultant, insurer, agent, servant or representative made, used or sold prior to the provision of such product or service by GoTo.com.

7. (a) In the event of a merger with, or acquisition of a controlling interest in GoTo.com by, or a sale or disposition of all or substantially all of the assets of GoTo.com to, a third party and/or successors in interest, MercExchange, for itself and its successors and assigns, covenants never to commence, prosecute or file any claim or cause of action relating to any of the Designated MercExchange Patents against such a third

party and/or successors in interest relating to any business, products or services that were acquired by the third parry and/or successors in interest in such a merger, acquisition, sale or disposition. The covenant of this Paragraph 7(a) does NOT include any product, apparatus, system, method or service that is covered by one or more claims of the '051 Patent or any claim of any subsequently issued patent related to the '051 Patent that are directed to any product, apparatus, system, method or service involving:

(i) directly performing or hosting online auctions, including, by way of example only, online auctions similar to those currently conducted or hosted by eBay.com, Inc., and presently located at the URL www.ebay corm;

(ii) directly performing or hosting "buy it now" online auctions with a fixed price purchase option, including, by way of example only, systems similar to those currently conducted by eBay.com, Inc., and presently located at the URL www.ebay.com;

(iii) directly performing or hosting "Name your price" online transactional systems in which a buyer offers a fixed price for a product or service, including, by way of example only, systems similar to those currently conducted by Priceline.com, Inc. and presently located at the URL www.price line.com; or

(iv) directly performing or hosting fixed offer consumer -to-consumer transactional online systems, including by way of example, systems similar to those currently conducted by Half.com, Inc., and presently located at the URL www.half.com.

MercExchange acknowledges that GoTo.com's "GoTo Search" and "GoTo Shopping," (defined below), as they existed prior to the Effective Date, do not infringe any claim of the '051 Patent.

(b) MercExchange, for itself and its successors and assigns, hereby grants GoTo.com a fully paid up, nondivisible, nonexclusive, transferable and assignable license under the Designated MercExchange Patents to make, use, sell, offer to sell the Channel Fusion Products (as defined below). Notwithstanding the foregoing, the license granted under this Paragraph 7(b) does NOT include any product; apparatus, system, method or service that is covered by one or more claims of the '051 Patent or any claims of any subsequently issued patent related to the '051 Patent that are directed to any product, apparatus, system, method or service involving:

(i) directly performing or hosting online auctions, including, by way of example only, online auctions similar to those currently conducted or hosted by eBay.com, Inc., and presently located at the. URL www.ebay.com;

(ii) directly performing or hosting "buy it now" online auctions with a fixed price purchase option, including, by way of example only, systems similar to those currently conducted by eBay.com, Inc., and presently located at the URL www.ebay.com;

(iii) directly performing or hosting "Name your price" online transactional systems in which a buyer offers a fixed price for a product or service, including, by way of example only, systems similar to those currently conducted by Priceline.com, Inc. and presently located at the URL www.priceline.com; or

(iv) directly performing or hosting fixed offer consumer-toconsumer transactional online systems, including by way of example, systems similar to those currently conducted by Half.com, Inc., and presently located at the URL www.half.com.

In addition, MercExchange, for itself and its successors and assigns, covenants never to commence, prosecute, or file any

cause of action against any person or entity for direct infringement, contributory infringement or inducement of infringement of the '051 Patent, or a subsequently issued patent related to the '051 Patent as defined in the preceding sentence, for making, using, selling or offering to sell the Channel Fusion Products. The covenant given in this Paragraph 7(b) applies only to the Channel Fusion Products and no other product, service, method, system or apparatus. All of the rights given in this Paragaph 7(b) may be transferred or assigned by GoTo.com or its successor(s) to a third party along with the sale or transfer of all or substantially all of the assets of the Channel Fusion Products.

(c) In this Settlement Agreement the following terms shall have the specified meanings: GoTo Shopping means the business that existed under the brand of GoTo Shopping or Cadabra prior to the Effective Date of this Agreement.

Channel Fusion Products means the products and services that existed under the brand name "Channel Fusion" of GoTo Auctions prior to the Effective Date, and all extensions, improvements and updates which perform substantially the same functions as the foregoing.

8. MercExchange hereby grants GoTo.com an option to obtain a covenant corresponding in scope to that of Paragraph 7(a) in the event of a sale or disposition by GoTo.com of all or substantially all of the assets of GoTo Shopping to a third party and/or a successor-in-interest, for the products, services and systems of GoTo Shopping that were acquired from GoTo.com and/or its successors. GoTo.com may exercise this option by making a payment (in the form of consideration GoTo.com receives from the purchaser of GoTo Shopping, so that if, for example, GoTo.com receives stock, MercExchange receives its percentage in stock) to MercExchange equal to 4.9 % of the sales price paid by the successor-in-interest to GoTo.com for the assets of GoTo Shopping (the "Option Price"). If exercised, such Option Price shall be due

and payable within ten business days of the date of closing of the GoTo Shopping sale by GoTo.com. In the event of an acquisition of, or merger with, GoTo.com pursuant to Paragraph 7(a), this provision does not apply.

9. Within ten business days of the Effective Date, GoTo.com will cause to be paid to MercExchange $4,000,000.00 (Four Million Dollars) (the "Settlement Payment"). GoTo.com shall deposit the Settlement Payment by wire transfer to the Hunton & Williams Washington Office Client Escrow Account: Account No. 17304932, ABA Routing No. 05400030, Riggs National Bank, 1920 L Street, N.W., Washington, DC 20036.

10. MercExchange represents and warrants that (i) it is the owner of the entire right, title, and interest in the Designated MercExchange Patents; (ii) it has the right to enter into this Settlement Agreement, to fully comply with the terms and conditions of this Settlement Agreement; and (iii) the execution, delivery and performance of this Settlement Agreement has been duly authorized by all necessary action on the part of MercExchange. Nothing in this Agreement shall be construed as a warranty of any kind as to whether any patents will issue upon any of the pending applications included in the Designated MercExchange Patents or continuations or divisionals thereof; or any warranty or representation by MercExchange that any manufacture, use, lease, or sale of any product, method, system or service by GoTo.com does not or will not infringe patents, copyrights, industrial design rights or other proprietary rights owned or controlled by third parties. MercExchange shall not be liable to GoTo.com or GoTo.com's customers as a consequence of any alleged infringement of any such patents, copyrights, industrial design rights or other proprietary rights.

11. Except as expressly provided for in Paragraph 7(b), nothing in this Agreement shall be construed as permitting or authorizing GoTo.com, its successors, affiliates, subsidiaries,

agents and/or representatives to grant a license to any person or entity under U.S. Patent No. 5,845,265, and moreover, they are expressly prohibited from granting any such license. Nothing in this Agreement shall be construed as permitting or authorizing GoTo.com, its successors, affiliates, subsidiaries, agents and/or representatives to grant a license to any person or entity under U.S. Patent No. 6,202,051, and moreover, they are expressly prohibited from granting any such license

12. GoTo.com represents and warrants that (i) it has the right to enter into this Settlement Agreement, to fully comply with the terms and conditions of this Settlement Agreement; and (ii) the execution, delivery and performance of this Settlement Agreement have been duly authorized by all necessary action on the part of GoTo.com.

13. Neither the performance of any covenants contained herein, nor anything contained or incorporated herein shall be deemed, nor shall the negotiation, execution and performance of this Settlement Agreement constitute, any admission or concession of liability or wrongdoing on the part of MercExchange or GoTo.com. Any such liability or wrongdoing is expressly denied.

14. This Agreement (including the Exhibits hereto) contains the entire and only understanding and agreement of MercExchange and GoTo.com relating to the subject matter of this Agreement, and supersedes all prior discussions, undertakings, agreements, and/or negotiations whether oral or in writing. No representations or warranties shall be deemed to have been made by MercExchange or GoTo.com in connection with this transaction unless expressly set forth herein.

15. The language of this Agreement shall be construed as a whole, according to its fair meaning and intendment, and not strictly for or against any party, regardless of who drafted or was principally responsible for drafting the Agreement or any specific term or condition hereof. This Agreement shall be

deemed to have been drafted by all parties, and no party shall urge otherwise.

16. No modification or waiver of this Agreement or any of its provisions shall be binding upon the party against whom enforcement of such modification or waiver is sought unless made in writing and signed on behalf of such party by one of its duly authorized officers.

17. Assignment by MercExchange of any of the Designated MercExchange Patents as defined herein, shall not affect any rights acquired hereunder, and any such assignment shall be subject to the continuing rights under all of the paragraphs of this Agreement.

18. This Agreement shall be binding on the parties, together with their successors, heirs, assigns, agents and representatives.

19. The terms of this Agreement are confidential. Notwithstanding the confidentiality of this Agreement, if either party determines in good faith upon the advice of legal counsel that disclosure of this Agreement and matters relating hereto is required under applicable law, the rules and regulations of the Securities and Exchange Commission, the New York Stock Exchange, NASDAQ Stock Market or any other regulatory body, then such disclosures, including public statements and press releases, limited to the substance of such required disclosures, may be made. To the extent practicable, except with respect to SEC and other regulatory filings and as otherwise may not be permitted by law, GoTo.com shall provide advance notice to MercExchange and MercExchange shall provide advance notice to GoTo.com, of any such required disclosure. In addition to and notwithstanding the foregoing, the parties may disclose to any third party the existence of the Settlement Agreement and refer said third party to any public filing that has been made to a regulatory body pursuant to the provisions of this paragraph.

20. With the exception of the California Civil Code Section 1542 recited in Paragraphs 2 and 3, this Agreement shall be construed, interpreted, governed, and applied in accordance with the laws of the State of New York, as presently existing, together with any applicable federal law. Should the Consent Judgment referred to in this Agreement be filed, MercExchange and GoTo.com agree to consent to the personal jurisdiction of the United States District Court for the Eastern District of Virginia for such Consent Judgment and further agree that any action to enforce the terms of the Consent Judgment shall be brought solely and exclusively in that court. Should any action or proceeding be brought either to enforce this Settlement Agreement or to enforce the Consent Judgment, then the prevailing party shall be entitled to an award of reasonable attorneys' fees.

21. This Agreement may be executed in counterparts, all of which together constitute an original, and facsimile signatures shall be treated as original signatures.

22. MercExchange and GoTo.com represent and warrant that they each have the full power and authority to enter into this Agreement and to perform all transactions, duties and obligations herein set forth. Each signatory to this Agreement who signs on behalf of a party represents and warrants that he or she has the authority to sign on behalf of that party.

23. Thomas G. Woolston represents and warrants that other than the patents and patent applications identified in Paragraph 1 there are no other patents or patent applications naming Thomas G. Woolston as an inventor, as of the Effective Date.

IN WITNESS WHEREOF the Parties hereto have caused this Settlement Agreement to be executed by their duly authorized representatives, effective as of the day and year indicated above.

MERCEXCHANGE, L.L.C.

By:_____
Print Name:_____
Print Title:_____
Date:_____

GOTO.COM, INC.

By: [illegible]
Print Name: Ted Meisel
PrintTitle: CEO & President
Date: 6/4/01

As to Paragraph 23:
By: _____
Thomas G. Woolston

Date: _____

MERCEXCHANGE, L.L.C.

By: /s/ Thomas G. Woolston
Print Name: Thomas G. Woolston
Print Title: Manageing Member
Date: 6/1/01

GOTO.COM, INC.

By:_____
Print Name:_____
Print Title:_____
Date:_____

As Paragraph 23:

By: /s/ Thomas G. Woolston
THOMAS G. WOOLSTON
Date: 6/1/01

APPENDIX A

Country	Serial No	Filing Date	Patent No
USA	09/264,573	03/08/99	6,085,176
USA	08/554,704	11/07/95	5,845,265
USA	08/427,820	04/26/95	
USA	09/166,779	10/06/98	-
USA	09/205,286	12/02/98	-
USA	09/253,014	02/19/99	
USA	09/253,021	02/19/99	6,203,021
USA	09/253,015	02/19/99	--
USA	09/253,257	02/19/99	-
USA	09/418,564	10/15/99	--
USA	09/422,057	10/21/99	--
USA	09/422,058	10/21/99	--
USA	09/422,059	10/21/99	--
USA	09/422,599	10/21/99	--
USA	09/556,653	04/24/00	--
USA	09/557,817	04/25/00	--
USA	09/644,857	08/24/00	--
USA	09/670,561	09/27/00	--
USA	09/670,562	09/27/00	--
PCT	US00/08594	03/30/00	
PCT	US00/06595	03/15/00	--
PCT	US00/06646	03/15/00	--
PCT	US00/09656	03/30/00	--
PCT	US96/06735	04/26/96	WO9634356A1

BEST AVAILABLE COPY

Exhibit A

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Norfolk Division

Case No. 2:00cv826

MERCEXCHANGE, L.L.C.,

Plaintiff,

v.

GOTO.COM, INC.,

Defendant.

STIPULATION OF DISMISSAL

Pursuant to Rule 41(a)(1)(ii) of the Federal Rules of Civil Procedure, the parties hereby stipulate to the dismissal, with prejudice, of the Complaint, each side to bear its own costs and attorneys' fees.

SO ORDERED this __ day of June __, 2001.

United States District Judge

WE STIPULATE TO THIS:

By: _____
Gregory N. Stillman (VSB No. 14308)
Robert M. Tata (VSB No. 30101)
HUNTON & WILLIAMS
500 East Main Street
Suite 1000
Norfolk, Virginia 23510
Telephone: (757) 640-5300
Facsimile: (757) 625-7720

By: _____
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Stanley G. Barr, Jr. (VSB No. 7224)
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Counsel for Defendant

Exhibit B

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Norfolk Division

Case No. 2:00cv826

MERCEXCHANGE, L.L.C.,

Plaintiff.

v.

GOTO.COM, INC.,

Defendant.

CONSENT JUDGMENT

Upon consideration of We consent of the parties, judgment is entered in favor of the Plaintiff MercExchange, L.L.C. ("MercExchange") in the amount of FOUP MILLION AND NO/100'S DOLLARS ($4,000,000.00), against Defendant GoTo.com, Inc. ("GoTo.com"), together with interest thereon from the date of entry at the rate of six percent (6%) per annum.

This Court shall retain jurisdiction over the parties in connection with any enforcement of this Order.

ENTERED this ___ day of June ___, 2001.

United States District Judge

WE CONSENT TO THIS:

By: _____
Gregory N. Stillman (VSB No. 14308)
Robert M. Tata (VSB No. 30101)
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Counsel for Defendant

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Norfolk Division

Civil Action No. 2:01cv736

MERCEXCHANGE, L.L.C.,
Plaintiff,

v.

EBAY, INC., et al.,
Defendants.

Norfolk, Virginia
April 22 through May 21, 2003

TRIAL TRANSCRIPTS

* * * *

[252] enjoy trading person to person. That's the second main reason for eBay's success. EBay's success has nothing to do with Mr. Woolston and nothing to do with his patents.

Before I explain what the evidence is going to show specifically about his inventions, I want to talk about the timing of his inventions, and that's very important. Mr. Woolston did not ask for the patent that is in suit right now. This '265 is called a consignment node patent. He didn't ask for that patent until after eBay and after other online auctions were open to the public and were used by thousands of customers.

Mr. Woolston filed his first patent application in April of 1995. However, that application did not mention a number of key terms. It did not mention transaction processor. It did not mention the World Wide Web. It did not mention these posting terminals that Mr. Woolston refers to. Those are things that he now claims eBay and Half.com infringed. In an April' 95 application, those terms weren't in his application. He didn't submit them. He didn't have those.

The other issue about the April '95 application, the first one that was filed, it didn't have all these terms that he's now alleging infringe. That was rejected by the patent office over and over, and it stands highly rejected. That patent has received a final rejection by the patent office [253] sometime ago.

Now, after Mr. Woolston filed that first application, it didn't have any reference to these things that he claims infringe now. There is a company called OnSale. OnSale launched its OnSale auction on the World Wide Web in May of 1995. It received an enormous amount of publicity, attention from the media and press. OnSale's launch was also covered by leading national magazines and newspapers, including the New York Times. And again, that was launched in May of '95. You will hear in this case from the inventors of that system. And yes, they have patents on that system. Inventors are Mr. Kaplan and Mr. Fisher. They invented the OnSale system and are responsible for that widely successful and publicized launch in May of 1995.

Ebay also launched its online auction on the World Wide Web on September 1, 1995. Now, at that time it wasn't called eBay. It was called Auction Web. But Auction Web was an immediate success. It soon attracted thousands of loyal customers or users.

Now, seven months after filing this first patent application, seven months—that was finally rejected by the patent office.

That April '95 application was finally rejected. Seven months later—and again, this is after the public launch of OnSale—after the launch of eBay, Mr. Woolston filed a new application, and filed this in [254] November of 1995. And that's the application that's at issue in this case, the '265. The '265 consignment node patent was filed in November of '95.

He added—you see, after OnSale and after eBay came out with their systems and other art was out there, Mr. Woolston added in November of '95 a whole new section to his invention. He added another embodiment, and for the first time he added these references to this transaction processor; for the first time he added references to the World Wide Web. That was never mentioned in his April application. And the first time in November of '95 is when he adds what he calls these posting terminals.

Your Honor, can I show a few boards, Your Honor?

THE COURT: Yes. Similar to the way that—

MR. RANDALL: Sure.

THE COURT:—was done earlier.

MR. RANDALL: To give you an idea of what he added, for instance—now, this is a complicated figure, I understand that. There is a lot of components on this. It is Figure 12 of this new patent application that he filed in November of '95. And I would normally point out the items that he added, but he added all of them. He added the entire figure, this whole thing. He added another figure very similar to this one as well.

Now I think he testified that, well, he was doing [255] it to clarify. Everything was in the April '95 application, but I just did this to clarify. Well, that's an entirely new figure and new information in this application.

In addition to that—I won't show you all of these, but this is what's called a red line version of what he added.

Everything that's underlined, everything that's underlined was added to this November '95 application. And I'm not going to go through and read all of this to you, but I will point out a couple of things.

Down here, and this is the first page of the text of the patent, it says summary of invention. And he adds, A new invention to the summary of the invention called this low cost computer means for used good and/or consignment stores to establish a trusted computerized market.

Let me show you a few other representative copies. I'm not going to read all this. Everything that's underlined he added apparently just for clarification.

This document here where he talks about his figures, he added Figure 12, which is a block diagram of the posting terminal to market maker computer. He added the entire Figure 13, which is a diagram showing the user interface on a posting terminal or a consignment node. There are multiple pages like this of his application showing entirely new information. Here is one, here is another. It goes on and on and on, and you will be able to see this later in the case.

[256] Now, I mentioned earlier that Mr. Woolston added numerous terms that were not in his April '95 application. Those terms are very important, because they are terms that appear in the claims. They appear in what he claims his inventions are.

Can you pull up the '265 claim chart? What's put on this board here, this shows down in the first column 1265 claims, a number of them, several, that are all impacted by- what he added in November. The new claim language is on the right-hand side. And as you can see, this interface wide area communication network; market for goods; the posting terminal; this communications handler; the storage device that's connected to this posting terminal—I'm sorry, post handler.

Down below, the presentation mapping module. *That's* what gets you to the World Wide Web. That was the meat grinder. The transaction processor. That's what apparently does—it does all this transaction. And again, I disagree with that chart that was put up. And this notification means. All these items are in those claims of his inventions. He didn't invent it in April of '95, that's for sure. He added it all in November. He added it all well after the public launch of OnSale and eBay.

Accordingly, we are going to present evidence, not just this evidence, but other evidence as well, that Mr. Woolston did not present these inventions until well after [257] eBay was a success, well after other online auctions were up and running on the Internet, on the World Wide Web.

Furthermore, when Mr. Woolston did provide the '265 application to the patent office in November of '95, the patent office looked at those claims and rejected all of them. Mr. Woolston then had to come back—the patent office had to rejected all of them in April of '97. So Mr. Woolston had to go back to the patent office and say—he looked around and decided what his invention would be. And he came back to the patent office. And it wasn't until July of '97 that Mr. Woolston submitted the claims that you are now going to be considering.

So those claims that he presented to the patent office that you are now going to be considering were first presented to the patent office in his July '97 amendment during prosecution before the patent office. That was two years, nearly two years after eBay was already around, and it was over two years after OnSale's public launch.

Now, in order to understand the evidence in this case, I'm going to provide you with some of the terms that Mr. Woolston used in his patents and his ideas. What Mr. Woolston wanted to do with his invention was he wanted to

link together ordinary pawn shops or consignment stores using computers. The evidence will show that the typical operations of a consignment store are as follows.

* * * *

[259] what he called a trusted network of consignment nodes. Think of a consignment node as like a consignment store. He wanted to link them together in what he called a trusted network of consignment nodes.

He referred to the store owner, this consignment store owner, as a consignment node user. That person would use this machine, this apparatus that would be physically located at the consignment store.

Now, while Mr. Woolston may have included some technical terms and jargon in his applications, things that he thought were new, they weren't new. The typical operations of the consignment store were known. And also, there were plenty of other applications, Internet applications, buying and selling goods on the Internet way before Mr. Woolston.

Mr. Woolston testified earlier in this case in what's called a deposition, that he believed he had extraordinary skills in the field of consignment node invention. The consignment nodes and the operation of these things, he had extraordinary skill in that art.

Can you play clip 38?

(The video clip was played for the jury.)

MR. RANDALL: And, for the record, that was page 87, lines 14 through 20.

So Mr. Woolston is not one of ordinary skill in the art, he's one of extraordinary skill in the art. However, the [260] evidence will show that he knew very little about the problems that he was trying to solve and the solutions that were already out there.

He testified that when he filed his applications and told the patent office that he had invented this new network of consignment stores, that he was unaware of the basic operations of consignment stores. So at the time he tells the patent office that he's invented this new network of consignment stores, he was unaware of how they operate, and yet he was one of extraordinary skill in that art..

Can you play clip number 34?

(The video clip was played for the jury.)

MR. RANDALL: That was at page 79, line 22. Can you show clip 33?

(The video clip was played for the jury.)

MR. RANDALL: That was at page 79, lines 8 through 20. Can you play clip 35, please?

(The video clip was played for the jury.)

MR. RANDALL: That's at page 82, lines 16 through 20.

So at the time Mr. Woolston filed his applications, claiming to invented this new network of consignment stores and the operation of those consignment stores, he knew very, very little about any problems associated with those operations. He didn't know about the operations of a typical [261] consignment store let alone how to solve any problems that did exist, even though he was one of extraordinary skill in the art.

Could you show clip number 32?

(The video clip was played for the jury.)

MR. RANDALL: Mr. Woolston timely filed his application. The evidence will show he simply wasn't in a position to know whether or not he really did invent anything new and novel and useful and an advancement of the art. He simply wasn't in the position to know whether he did that or not.

Can you play clip number 18?

(The video clip was played for the jury.)

MR. RANDALL: You will hear in this case an enormous amount of evidence about what specifically Mr. Woolston invented. It's this consignment node concept, the concept of bringing typical operations of a consignment store to computers and linking them in a trusted closed network. You will hear an enormous amount of evidence about that, and yet at the time he filed his applications, he didn't know what a consignment store was or any of the typical operations.

Due to some of the problems that Mr. Woolston was trying to address, namely, fraud, many of the concepts in this case are going to center around trust and honesty. EBay's system is a person-to-person system in which sellers deal [262] directly with buyers regarding the sale of a good. EBay's system is based on the fact that buyers and sellers will trust each other, ordinary buyers and sellers will trust each other to do this transaction. EBay opens its system to nearly everyone everywhere who wants to list nearly anything for sale. They have an open system.

The evidence will show that Mr. Woolston's system is a middleman system or an intermediary system in which there is a trusted intermediary between the buyer and the seller, and that trusted intermediary inspects and handles the goods, they store or warehouse the goods. And the buyer and seller, they don't deal directly with each other. They deal only with that trusted intermediary. That's the only person they deal with. That's a closed system.

Mr. Woolston's system is based on the fact that buyers and sellers won't trust each other or don't need to trust each other because they'll trust its middleman. The eBay system is based on buyer and seller trusting each other to do this transaction. Mr. Woolston's system is saying, no,. the buyers and sellers won't trust each other, so why don't we just put a 'trusted

intermediary in the middle, and you will trust that trusted intermediary to conclude the transaction for you.

Mr. Woolston's system, only this trusted intermediary can post or list goods for sale. Buyers and [263] sellers, ordinary people don't list goods for sale. It's just this trusted intermediary, like a consignment store owner. That's the only person that can post these goods for sale.

Let me give you an example of the differences with a real transaction. Let's say that you had a painting you wanted to sell for a few hundred dollars. In Mr. Woolston's closed intermediary system, here is how that would work. The trusted intermediary or consignment store owner would accept the good, inspect it, make sure that it was of an appropriate quality, make sure that the description of the good was accurate, and then post the good on this network. And he would vouch for all of that, the quality, the accuracy after this inspection.

When you bought that good, you would buy it from this trusted intermediary. That's who you would send your money to. You send your money to this trusted middleman, and that person would then send you the painting and you would trust that person to do that. You trust that, number one, they inspected it, number two, the description is accurate, and number three, that when you send your money to this trusted intermediary, you are going to get the painting.

And Mr. Woolston—and eBay—and, by the way, in that example, the buyer and the seller never meet each other, never communicate with each other, never have to transact any business whatsoever with each other. You don't have to trust [264] that other person.

In eBay's person-to-person system, the seller, who is likely a stranger, lists this painting on eBay's Web site, for instance, and puts a description of this painting and maybe a picture. Now, when you are bidding on that, you are free to send e-

mails to the seller. You are free to exchange information with the seller. Maybe get the phone number, call this person up, ask them some questions about it or do it through e-mail, whatever way you want to do it. Now, you may or may not get responses from that person, the seller. If you don't get any responses, maybe you just say I don't feel comfortable buying it then, or maybe you do, but it's up to you whether you want to proceed or not.

And let's say you go ahead and proceed. You looked at the description and you looked at the picture and you decide you want to buy this off the eBay Web site. You are going—if you are the winning bidder, you are going to buy it directly from that seller, and you are going to be placed in contact with them. You are going to have that seller's e-mail number and maybe a phone number, and you are going to communicate about how that good is going to be shipped to you.

When you send your money to the seller—and you are going to send it in any number of ways. Maybe the seller says I want a cashier's check. Well, then, you send the seller a cashier's check. The seller may say I want a wire. I [265] want you to wire this money to me, or I want you to do it online through an electronic payment system. It doesn't matter. It's up to the seller how the seller wants to be paid.

And when you send your money, if you have ever used it—and I don't know how many of you have—but just think about it. What kind of a queasy feeling would you have the first time you ever used eBay and you sent your money off to some stranger. You are trusting that stranger. You are trusting that stranger to send you the goods after they get the money. You sure hope they do.

So you send your money to the stranger, and you hope that they send you the good, number one. Number two, that they have it. Number three, that they have accurately described it.

that you are getting what you thought you paid for. And that's the trust. That's the person-to-person aspect of it. You are trusting this other person to send you this item, and that it's actually bona fide exactly what you wanted to buy.

So, the fundamental differences between these two systems are—really, there is a number of them, but you can categorize them in two ways. One is the trust, the trust and where you place that trust in eBay's system. We trust the buyer and seller to behave honestly with each other and to treat each other fairly.

[266] And in Mr. Woolston's system, he says, no, the buyer and seller won't ever meet. They won't ever communicate. They don't need to. They won't trust each other. Only deal through a middleman, that's it. His system is a closed, system. Only permits this trusted middleman to post the goods. And our system is an open system; allows everybody to post these goods for sale.

Can you pull up the eBay user agreement? These are excerpts from eBay's user agreements, and it can be found at Exhibit 112. But as the chart says, eBay is not involved in the actual transaction between buyers and sellers. And as a result, it has no control over the quality, legality, truth or accuracy of the listing, etc. And the reason for that is that eBay never takes possession of the goods.

Go to the next one. Here is some other cautionary statements in the user agreement. That eBay can't guarantee you that the transaction can be completed, and they don't control the information that's provided by the seller.

So eBay's system allows everyone to list, and the reason it does that and the reason it can't inspect all the goods is that whoever is selling on eBay has the good in their possession. They have it. They describe it. When they get the money and they are satisfied, they send the good to the buyer. eBay never

takes possession of the good. They never inspect it. They never vouch for the description of the good.

[267] EBay simply trusts, trusts that the sellers are going to be honest. They trust that the sellers are going to describe their goods accurately, and they trust that the seller is going to send that good to the buyer when they get paid. EBay's system believes that the buyers are going to trust these sellers. The buyers are going to trust the seller to accurately describe it and is going to send them the good when you buy it.

Now, there are a few problems that Mr. Woolston, I think, was trying to solve through his inventions, through linking together these pawn shops or consignment stores. He believed that the buyers and sellers wouldn't trust each other and that no one would buy something from a stranger. So what he suggested was to put this trusted intermediary in the middle and you would bring the good to this trusted intermediary, this consignment store.

A local consignment store brings the good to them, let them inspect it, check out the description of the good, and then post using this apparatus from a machine that would be in that store, and then that Way, the only goods that would be for sale on this network would be those goods that had been checked. They had been checked for quality, the description was accurate. And you knew that when you bid on one of those goods, you knew that that good actually existed, it had been inspected, and it is sitting right there in the consignment [268] store, the consignment node operator, and you know that when they pay that store, they are going to send you the good. You are not dealing with another person. You are dealing with this consignment node store.

Mr. Woolston also wanted to come up with a way of searching for information, and his solution was that if you linked these consignment stores together on a computer, the way you can search the various stores to find a particular item

was if you have—each store have the same software. So if each store has the same computers, same apparatus or machine, and the same software, you can create a closed network or a trusted network, and you can then search for those items.

I think that there is a ton of common examples out there in the world about closed networks, where you have access to certain things because it's within a network, but others don't. Well, that's what he wanted. He wanted to make sure that the only goods that were posted on this system had been inspected and prequalified and the description had been checked; and when he searches those goods, he wants to make sure that everybody is tied into a common operable network that uses the same equipment and the same software. He never disclosed anything else. He never disclosed to be able to search on different platforms, different machines, different software.

[269] Let me want to walk through some examples specifically from his patent, and these—this information comes from two sources, actually. One, from his patents, and two, from his business plan. Mr. Woolston, at the time he filed his applications, also wrote a business plan and a few different variations of his business plan, all describing his inventions and what he meant by that specifically. So these are not my words, these are his words, and you are going to hear more evidence about this. But I want to show you a few slides showing the key concept of his—what he claims he invented.

Can you show the slide? All right. This is a portion directly from his patent where he says, under the summary of invention, that it's to establish a trusted computerized market.

Go to the next slide. This is Exhibit 358, which shows that he believed that Internet customers were required to make a huge leap of faith, that they were going to get ripped off, and

that his present invention solved the problem by putting this trusted intermediary between the buyer and the seller.

Go to the next one. Here, Mr. Woolston—and this is Exhibit 597—states that the prior art does not provide this avenue for participants to speculate. That's another aspect of what he considered to be his invention, which was if [270] the consignment node owner or consignment store owner held the goods that he already inspected and so forth, and if you bought the good at that time, whether it's a baseball card or whatever else, it's still sitting there at that consignment store, right, and so you bought it.

Say you bought it for $10 and it's sitting there at the consignment store, and the consignment store owner calls you up and notifies you that he's now purchased this baseball card for $10 that's sitting here, would you like me to ship it to you. You could say, Well, why don't you keep it. Keep it. You've got a description of it, you have already inspected it. Just put it back on the computer for $12. I think I got a good buy on it. Put it back on for $12. That's his speculation feature that he claims to have invented.

The only way you can implement that, the only way is if that good stays with this trusted intermediary. If it stays with that trusted intermediary, then you can turn around and say, oh, just go ahead and repost it for sale. You have already got it, you have inspected it, you got the detailed description of it, just repast it. That's the speculation feature.

Go to the next slide. This is also—the next slide is also from his '265 patent, and this is where he -this section of slides is where he describes exactly what the trusted network of intermediaries or franchisees do. And he [270] suggested that in his patent, that they would be trusted intermediaries and that they would also be franchisees. You give them a license to post goods on the system.

And what he talks about is providing a trusted means to assure the potential buyers of the goods' bona fide availability and legal title. What he means by that is that the goods that are posted on his network, his closed system, someone has checked them, they are authentic and they have title to them and they are ready for sale, they are sitting there ready for sale. Also, he talks about the obvious fraud in the bona fides of the collectibles. That means that they are not authentic.

This is a demonstrative which has been provided to us, which is basically what his system looks like. You've got buyers and sellers, and in the middle you've got this trusted intermediary who inspects the good, adds value to the description, meaning if, for example, the good appears to be in wonderful shape, then the consignment node owner can add a description saying-I have looked at this and it's in great shape. Adds to the value of the description by also just basically checking it and saying, yes, it's good, it's an accurate description of this good.

The trusted intermediary also transfers ownership of that good. So, for example, in Mr. Woolston's system, you have deposited a good with this trusted intermediary. You [272] have signed a—apparently signing over title to this good and allowing the trusted intermediary to sell it, and when the trusted intermediary sells it, he gives electronic title or switches the title in the system and now gives title to the new buyer.

Let's go to the next slide. Again, this is under the summary of invention section, to provide a trusted network of consignment nodes that act as brokers.

Go to the next slide. Here he's talking about—and again, this is under the summary of invention. When you look at the patent, you will see that there are a number of paragraphs under the summary of invention where he claims that this is

what I invented. And again, he calls these consignment node operators trusted licensees or franchisees of the software and hardware necessary to create the consignment node. What he's talking about is these are trusted licensed franchisees that have this equipment in their store and they are capable of accepting goods and putting them on this network.

Let's go to the next slide. This is also from the patent where he is talking about his framework of trusted franchisees provide high confidence and accuracy regarding the legal finality of the transaction. And he claims that this is a massive step toward building confidence between buyers and sellers. And when he's talking about the legal finality of [273] the transaction, is that when you put a bid in his system to buy something, that trusted intermediary immediately changes title right then to the seller, and it's done. There is no dealing between the buyer and the seller at all.

Let's go to 3, Section 3. In terms of adding value, one of the things that this trusted intermediary does is adds value to the descriptions. So it's the trusted posting of goods on the market and adding value. That means that when there is goods for sale on this, you know that, number one, it wasn't just some stranger posting something. You know who posted it. The only people that can post on his system are those people that have been licensed or franchisees and it's not a stranger. It's someone that actually has an agreement with this consignment node network.

Next slide. This is from his business plan, written about the same time that he filed his first application where he says no individual or business may operate a consignment node without being a member of the franchise.

Go to the next slide. Again, from another business plan. No individual or business may post goods on the Fleanet market without being a Fleanet franchise owner. Fleanet was a business that he started to implement and build his inventions.

So at the same time he filed his application, he started this company called Fleanet, and he intended that [274] business to build and operate these consignment node networks and build his inventions. And what he is saying is you can't post unless you are a licensed trusted intermediary.

Go to the next slide. The same thing. If you Want' to sell goods, you must sign a bailment contract-and-turn over physical possession of the goods to the franchisee. What he's talking about is in order to sell a good, you have to go down to the store, give them the good and sign a contract saying, here you go, you have possession of it now and You are authorized to sell it. Very much.-like a consignment store.

Next slide. Go back one. Again, this one, all goods posted on the Fleanet market must be in the physical possession of a Fleanet franchisee. And we've gone over this. The goods have to be in that store, and that's what creates. this trust he's talking about. Ebay doesn't have any warehouse space for goods. EBay'never takes possession of these goods. It is a completely different system.

In Mr. Woolston's system, the trusted intermediary does everything, stores the goods, keeps them, and eBay never touches the goods, never sees the goods, Certainly doesn't inspect them. Certainly doesn't change the description of the goods and doesn't limit who can post the goods for sale.

Let's go to tab 4. These slides are also from the patent, the '176 patent, and because both of his inventions, both of his patents share what's called the same [275] specification, the same description of his inventions is used in both of these patents. And so I have been talking about his system and about his concepts. They apply equally to both patents.

And so when he's talking about searching, he searches the plurality of consignment nodes to search for a used good or collectible. What he's talking about searching is those members of his closed network, the consignment nodes or

consignment stores. That's the only thing he attempted to disclose, and that's the only thing that's he claimed, searching these trusted network participants.

Go to the next slide. Here he describes in the patent what he's talking about. That you log onto the consignment node to formulate a search for a particular good. The consignment node then searches its own database for the requested good or generates agents to search and report back a request of other consignment nodes. Let me explain that for a minute.

If someone says I want to find a Babe Ruth baseball card in his system, the consignment node operator would look in his own database and see if he has it or search the other databases of the other consignment stores that are tied to that closed network. He never disclosed anywhere in his inventions anything about going outside that network.

And, in fact, in this case you will be instructed [276] that what it means to search is you have to search through this trusted network. That's what you have to search through. You don't go outside to third patties or anyone else. You search on this network that has cannon software, common equipment, and you also search for a particular item.

Go to the next one. And you-are going to hear this term because it appears in some of the inventions. Searching a plurality of consignment nodes for a used good.: That's what he's talking about, searching a number of different stores that are all tied to this network.

Go to the next slide. This also is from the patent, and what I want to direct your attention-to is the last paragraph where it says, The agent handler may be entered by a predetermined series of codes and verification procedures to verify a request for an agent connection to the consignment node is from a bona fide agent and a-bona fide consignment node.

What he is saying there in his patent is that the only people that can search his network are those consignment stores themselves. It's a closed network.. Third parties can't get into it, and the only people that conduct a search are the members of this trusted network.

Go to tab 6. Again, this is under the summary-of his invention, his patent. Consignment node then transfers legal ownership of the good by changing the ownership entry in [277] the data record and the consignment node of the good.

What he's talking about here in his invention is that when someone buys a good, the system itself, this consignment store, it has possession of the good, it has title of the good, and it's-logged into a computer. That information is stored in the computer. What it does is it electronically transfers the ownership. It says instead of John Smith owning this baseball card, now someone else will own this baseball-card, and they just transfer it electronically to someone else. That's what they do.

The only way you can do this, the only way you can perform this transfer of ownership function—and this is an important claim in this case—is if you have ownership. See, if you—if a system never takes possession of the good, never takes ownership of the good, how can it ever transfer ownership of that good? In Mr. Woolston's system, you had to take—physically take the good to his consignment store, sign a contract, turn it over, and then it was in the hands of his trusted bailee, transfer ownership when it was sold. His claims require that. His claims require this transfer of ownership.

EBay never takes possession of goods, never sees them, never inspects them. It never acquires any ownership in that good, period. It cannot transfer ownership of that good because it never required ownership, and that's a big point in [278] this case.

Go to the next slide. This is his other feature which is speculation. Think about the speculation function. If you are going to buy and sell rapidly a good, let's say a baseball card, that baseball card has to stay at the consignment store. It has to be—the electronic title of that baseball card has to be stored there at that consignment store. And if one person buys it on one day and then he reposts to sell it again, and then reposts it to sell it again, it makes sense that that card would have to be sitting there at that consignment store with an electronic entry in the computer to just switch who owns the card.

The only way you can accomplish this invention that he claims he has is if you have possession of the good and you have ownership of the good or ownership interest, which eBay never has.

Go to the next slide. Next slide. Stop right there. This is what he's talking about. This is, again, another slide from his patent about this speculation function. He says, It's understood that the purchasing participant may elect to leave the good or collectible at the consignment node and post a new offer or reserve price. Saying after you buy it, it doesn't have to be sent to you, it can just stay there and repost it at a higher price.

Go to the next slide. This is from his business [279] plan in 1995. It's Exhibit 358. And it says, In theory, a small business could design around the claims—meaning avoid them—of the consignment node patent—and that's his '265 patent—by manually entering information and using the server in pure retail mode, e.g., no speculating in the electronic market.

So if you don't perform this speculation function, you don't infringe. He is saying you don't have—and you cannot possibly perform a speculation function unless the goods are sitting there, you have inspected them, they are in your

facility, you have got title to them, and you can transfer them. EBay doesn't do any of that. Never has.

Keep going through the slides. Yeah, stop there. This is a '265 patent abstract. And what that means is that at the start of your patent, you have an opportunity to kind of summarize what you think your invention is. And when Mr. Woolston filed his November version, this new November 1995 application, this is what he wrote. He prosecuted this patent himself and he wrote it.

He says, It's a legal framework that establishes a bailee relationship and consignment contract. And then near the end of this he states, While assuring the safe and trusted physical possession of a good with a vetted bailee. That's what his invention—at least that's what he thought his invention was. That's what he was claiming it was.

[280] Basically, it's a consignment store tied together with computers. You bring your good to this consignment store, look at it, they post it if they want to, and if you wanted to buy it, you can buy it. But definitely, the consignment store controlled the posting, controlled the good, inspected it, and maintained physical possession of it, and acquired, apparently, an ownership interest in it with this bailee contract saying I'll let you keep it and you can sell it if you get my price for it. EBay doesn't do any of that and never has.

I told you earlier that Mr. Woolston was not the first person to come up with these ideas. He's been trying to get patents issued from the patent office for the last eight years. In the last eight years, he's filed 16 different applications, all based on the same specification. And I think Mr. Stillman stood up and put that specification in front of you, all the different pages and different components of it. Sixteen different times. He only has three patents and two of which are in this case.

The patent office during this eight years, during the 16 applications, all trying to squeeze inventions out of the same description, the patent office has rejected thousands of his claims, thousands. The patent office during this process—and there have been numerous, different patent examiners that have all handled his various applications, many [281] of whom have rejected all of his claims in its entirety. They have told him repeatedly—he's a patent lawyer, and he's been prosecuting his own patents for much of the time. They have told him repeatedly, these ideas and concepts are not new, they are not novel. Others did them. And he still keeps coming back, coming back hoping somebody let something through.

Also, there are some key prior art systems that were never before the examiner, the particular examiner who examined this '265 patent. Key prior art that that examiner never had before her, never considered. You will consider it and it will be evidence in this case.

Do you want to put up the chart of the known '265 elements?

You saw earlier a demonstrative about certain components that were all allegedly in eBay's system, and disagree with the chart, but we'll talk about that later. But these are all concepts in this chart. These are all concepts that he claims are his inventions and components of his inventions: This posting terminal, the market for goods, communication means, communications handler, storage device, presentation mapping module, transaction processor, and notification module.

There is a column that says patent office examiners. And during these eight years, during these 16 applications, [282] during the rejections of thousands of claims, the patent office has repeatedly told Mr. Woolston all those concepts are well-known. They are well-known. Anyone of ordinary skill, let

alone extraordinary skill, ordinary skill in the art would know these things. They are obvious. Every one of those components are obvious. That anyone ordinary skill in the art would know them. And MercExchange's own experts, Dr. Weaver, has also admitted that all of those are known. All of them.

Can you pull up the next slide? I'm going to talk about some of his prior art right now and try to move through this. I understand it gets tiresome.

This is the '265 consignment node patent. In April of 1995, online markets for Internet businesses were known, online transactions to transfer the payment and ownership were known, and online posting of goods was known. Mr. Woolston is not the first person that did any of this, and we've got plenty of art and our witnesses will testify about that. But the suggestion that selling on the Internet through e-commerce aspects is something that Mr. Woolston invented, he absolutely did not. Not even close.

Go to the next slide. Okay. Online markets were known. In 1986, the ACORN Network was online nationwide allowing collectors to buy or sell collectibles in an online auction.

ACORN Network, you are going to hear from the folks [283] who came up with that, Mr. Blankley and Mr. Mintz from Memphis, Tennessee. They had a wonderful system. In '96, they were selling coins and other collectibles, and they had a system where if you wanted to sell a coin, you would come into their store, give them the coin. They would inspect it, inspect that coin, make sure it was authentic, because they didn't want coins on their—coins and other artifacts on their system that weren't authentic. And the testimony that you are going to hear from them is that if you allow that, then your system isn't worth anything, and they didn't want that.

They wanted to inspect everything before it went on the network. So all of the coins and notes and other financial instruments, artifacts were all inspected by the ACORN

Network company in Memphis, Tennessee, and then would post these items on the network, a closed network.

Accessible by CompuServe. And so if you did a search or something on the Internet for a collectible, you went to CompuServe. You go right to their site and go right to their network and be able to look at all the number of different pennies, for example, or something like that, all of which you knew had been inspected, were authentic, and would be sent to you if you sent your money in. And you are going to hear from those two gentlemen.

The next slide is—not a slide, but in 1994 there [284] were plenty of systems available for buying and selling livestock online. I mean, you can imagine, you wouldn't want to ship—constantly ship livestock, but if you wanted to buy cattle or other types of livestock, you can certainly do it. And there were plenty of online auctions for that.

In February '94, Ken Nahan filed this patent, the '111 patent, for a trusted network of online art dealers. That system, the Nahan system, was never before the examiner of the '265.

In that system, if you wanted to sell—for instance, Mr. Nahan and his Wife came up with a system whereby there was a network of art dealers, for example, art dealers across the country could join this network and take images of the paintings and art that they had in their shop, put it on this network.

And so, for example, if you walked into an art shop down the street and you said I want to look at a certain artist's painting, there would be a search done on the network, just like Mr. Woolston claims, of all the dealers that were tied to that network, and what would come up would be all of the art work by that artist. Or if you wanted to do it by color, or if you wanted to do it by someone—you know, outdoor sculptures, anything like that, you could search this network

and, all of a sudden, you would have these pictures come up to you. You could sit there and look at them, and you [284] buy them right through the system.

It discloses—this Nahan system discloses much earlier everything that Mr. Woolston claims. You are going to see videos of this system. Much more sophisticated than what Mr. Woolston came up with. And it was not never considered by the examiner.

Now, one thing about the Nahan system—and I told you about 16 different applications and number of different examiners—when somebody did find the Nahan system, the PTO cited it repeatedly against Mr. Woolston. So when that system surfaced, it was cited repeatedly to reject his claims. He knew all about it, and yet we are still here today. And I'm not forcing anybody to be here today. We were sued.

Go to the next slide. I'm sorry. Back up. There were also cars—online car auctions well before Mr. Woolston. In February of '95, before Mr. Woolston also, the Earth Foundation reported this rock and roll art auction, some 26 million Internet users that it was opened up to. And you are going to see this art, and we'll have experts and they will walk you through it. I'm just letting you know now that there is a load of art out-there about online auctions, online selling of goods. Mr. Woolston isn't even close to the first one to do it.

Go to the next one. These are additional online transactions. There was some suggestion that taking a credit [286] card over the Internet was somehow-novel or something. In '92, this Netbill service was an online Internet payment . transaction system.

The next bullet point. 'Stephen Crocker founded CyberCash in August of '94 to create accounts for-transactions over the Internet. You are going to hear from Dr. Crocker. He's going to testify. You are going to hear about how he developed the predecessor to the Internet, Arpanet. He was, one of the few engineers who worked on that project and

developed it. He understands protocols very well. He founded this company in August of '94 to do secure transactions over the Internet.

Again, in March '95, OpenMarket also had an online service for products.

Go to the next one. Posting terminals, also something that's going to be in this suit Mr. Woolston claims to have invented. These are references from the patent office. One of ordinary skill in the art would have been motivated to use a digital camera for scanning the image of a good as it can be accomplished at the terminal. Bar code printers are known.

The AMC system—and you are going to hear from the inventors in that system as well—disclose creating an electronic image/data record for distributing to potential buyers.

[287] So we are going to disclose witnesses, art, we'll walk through the art regarding selling things online much before Mr. Woolston. The Nahan system is a wonderful system that you are going to be able to see, not just look at a patent and figures. The ACORN Network system, all of the other articles, we'll have a number of witnesses come and summarize this art to you.

And I think you will come to appreciate that while some of this stuff may be new right now in terms of just seeing it for the first time, you will see that all of this was out there. There was a tremendous wealth of art out there in this much before Mr. Woolston about selling goods online and about doing the same things that he claims he invented. Much of that art was never before the examiners. Once they found the art, they repeatedly rejected repeated attempts to get more claims.

There was something else I mentioned earlier in this opening, which was the description of his inventions and his patents. We have—you have to describe in your invention, your invention sufficiently to allow someone of ordinary skill in the art to build it. That's the bargain you have with the

government. That you can get a patent, but the only way you can get a patent is if you describe how to build it. You have to teach those of ordinary skill in the art how to build this new thing that you have now created. Mr. Woolston didn't do

* * * *

[292] Goodwill or Salvation Army on your own, some old clothes or something like that and go down and deliver it, would you then say that—and someone came in and bought a pair of jeans for two bucks or something like that, would you say that the Salvation Army and Goodwill searched your home for those jeans that particular item? No, you wouldn't. Well, that's what's happening in this case.

Half.com is provided a host of information by third parties. Third parties deliver to Half.com information. Half.com takes that and puts it in their database, okay, and then a user comes along and says,' I'd like an AM/FM radio. Half.com says, Here it is, it's in my database, there you go. Has Half.com conducted a search of a plurality of these other databases for that item? No, of course not. Just like the Salvation Army or Goodwill didn't do a search of your house for those pair of jeans that you dropped off with dresses and other things. They didn't do a search of your house. It's just not the same thing. It's completely different. And that's going to be an issue that you will decide in this case.

There was a mention about a meeting between eBay and MercExchange. MercExchange approached eBay and wanted to there was a lawsuit going on between eBay and another company called Bidders Edge, and it was over whether or not Bidders Edge could search eBay's site, and eBay said, no, we don't want you searching our site, you are clogging our network.

[293] So there was a lawsuit between eBay and Bidders Edge, and MercExchange heard about it. And MercExchange came to eBay and said, hey, maybe we can swap. You know,

maybe you can take this '176 patent. It will help you out in that lawsuit.

There is a gentleman named Mr. Phillips who is Mr. Woolston's friend. He's an attorney. He's a co-owner of MercExchange, and he also happened to be an old classmate of someone that worked at eBay. So he called this guy up at eBay and said, hey, we've got a patent, maybe we could help you out with this Bidders Edge case. And there is some correspondence between MercExchange and eBay about that. That call and that communication took place between eBay and MercExchange before any communications with the lawyers.

Mr. Woolston testified in his deposition that what he wanted to do with respect to that meeting was he wanted to horse trade. He thought that maybe he could provide some intellectual property rights to eBay and that eBay would provide some intellectual property rights to him, to allow him access to eBay's site or something like that. But he clearly understood that that eBay-Bidders Edge decision was about whether or not third parties could come onto your Web site, and he had a patent that he thought allowed that, and so he wanted to discuss that.

At the time of this meeting—a couple of things

* * * *

[304] Q. Do you have any children?

A. Yes. I have a daughter, Georgia. She's almost

THE COURT: Mr. Woolston, I think if you move the mic back, you might be able to sit back and be more comfortable. I don't know, it's up to you. But you're kind of sitting there at the edge. So however you want to do it, that's fine.

THE WITNESS: That's better.

BY MR. STILLMAN:

Q. All right. Mr. Woolston, how are you currently employed?

A. I'm employed by MercExchange.

Q. What is the business of MercExchange today?

A. Now it's primarily, Mike May and I, we are trying to find a home for the intellectual property. We are trying to sell it or license it.

Q. Tell the jury, if you would, something of your personal history and background. Where are you from originally?

A. I was born in Pontiac, Michigan 1963, and I was raised in a town called Lionel, Ohio.

Q. And what did you do after you—or when did you graduate from high school?

A. I knew you were going to ask that. I think it was 1981.

* * * *

[305] Q. And what did you do after high school?

A. I enlisted In the US Air Force.

Q. What kind of training did you get in the Air Force?

A. I spent a year In Biloxi, Mississippi, getting electronics training. Basically electronics, computers, radars. We studied the B526 and D models.

Q. What was your job in the Air Force?

A. Primarily understanding these computer systems and fixing them and maintaining them.

Q. What Is the B52G?

A. It's a very old bomber, but It's a good one. It's a bomber. It has an electronic warfare system on it that defeats radars from tracking It and countermeasures to evade radars and protect the crew.

Q. And did you fly on that plane?

A. No. I didn't fly on the 1352G. I got accepted Into a, the Peacetime Aerial Reconnaissance program and had another year of electronics training. This was modern

computers, modern telecommunications systems, telephony, some Soviet-era communications systems, cryptography. That's how they scramble communications between, between ourselves and who we want to talk to. And radios, receivers.

Q. You mentioned the Peacetime Aerial Reconnaissance [306] program. What was that?

A. What I was doing was working on an aircraft called the RC-135. It's, It kind of looks like the AWACS with this Frisbee on top, except ours, we didn't have the dome, we had antenna out of the bottom of the plane.

I was stationed In Okinawa, Japan. We would fly—I was a crew member. We'd fly missions from 12 to 17 hours, about ten or 12 miles off what was then the Soviet Union and north Korea and China.

Q. Did you have the opportunity to pursue any educational opportunities in the Air Force?

A. Not when I was In Okinawa. We were pretty busy there. We'd fly maybe Monday, Wednesday, Fridays, and when we weren't flying we were generating the aircraft for the next day's mission. I did that, for almost two gear's and then I was assigned to Fort Meade, maryland, National Security Agency, and there I did have an opportunity to start going to night school. I started at University of Maryland, computer science.

Q. You studied computer science at the University of Maryland?

A. Yes I did.

Q. How long did you stay in the Air Force?

A. About four and a half years.

Q. And were you honorably discharged?

[307] A. Yes, I was.

Q. What did you do after being honorably discharged from the Air Force?

A. When we were at the Fort Meade station, a lot of young guys were getting recruited to other federal govern-

ment agencies. Some of the guys were going to the Drug Enforcement Agency. I got an opportunity to apply to the Central Intelligence Agency and I got accepted and then I joined the Central Intelligence Agency out of the service.

Q. What did you do when you were In CIA?

A. Well, I can talk about It how. Back then I was undercover. We primarily built and maintained and managed and found applications for our global communications network. We had a network we could command and control from Langley to the rest of the world that, the station chiefs and the other Intelligence assets around the world. But It was particularly my job, I was a primarily an engineer, so my job was to plan these networks and find uses for our network.

Q. Now, when you were working for the Central Intelligence Agency, did you continue your college studies?

A. Yes. I did.I had the opportunity to transfer to George Washington University down in Washington, D.C., and I switched majors.I switched to electrical engineering and computer engineering.

[308] Q. And did you eventually receive a degree from GW?

A. Yes. I graduated In 1991.

Q. Well, how long did you work for the Central Intelligence Agency?

A. About six years.A little over six years.

Q. And when did you leave the CIA?

A. I left the CIA in, I would say, '93, '92.

Q. Okay. And what did you do after that?

A. I had finished electrical engineering school and I started law school at night. And I was taking out all these student loans, and I needed to find a Job so that I would not go bankrupt. So I took a job as a law clerk at a Washington, D.C. firm.

Q. What was the name of that firm?

A. Howrey & Simon.

Q. And while you were clerking at Howrey 8 Simon, did you take classes at night at law school?

A. Yes, I did.

Q. And was that at GW?

A. Yes, I did.

Q. And when did you get your degree at OW Law School?

A. I finished my studies in 1994. I actually graduated 19 spring of 1995.

O. Did you practice law?

A. I did For a while.

[309] Q. Where?

A. After I got out of law school Howrey & Simon offered me a Job as an attorney. So I was there for a while. About a year and a half, I'd say. Then I went to, went to another law firm, Fisher E. Richardson. It's another big law firm. And then I came to your law firm for about a Year.

Q. How, you've heard the discussions this morning in opening statement about the two patents which are the subject of this suit. When did you first become interested In the general subject of e-commerce?

A. Well, I was aware of the Internet In the '80s when I was an electrical engineering student. I used to use super-computer time down in Los Alamos for an engineering project I was doing for the National Institute of Science and Technology. So the Internet was there.

What got me thinking about business applications was, I believe around 1993, the government said It was going to privatize the Internet and a lot people were looking about how to, this was the first time that businesses were going to be allowed to run over the Internet In commerce applications, and I began thinking about it then.

Q. When In 1994 did you start thinking about the application as it might pertain to you personally?

A. I had been thinking about this through the summer [310] of '94. There's Just a memory that sticks out in my mind to this day, and that was the strike of Major League

Baseball that was going that summer, and then around August they had cancelled the World Series. And I had heard on the radio that there was a baseball card store in McLean, Virginia that was probably going to go out of business. Apparently there was some fan backlash, some resentment against the players for letting the strike go so far that the World Series actually got cancelled that gear. And the story was basically that the fans had lost Interest In buying baseball cards and selling them. And the market was just dried up, and this small business was probably going to have to go under.

Q. What technology, to your understanding, was available In 1994 to enable a seller of a baseball card, for example, a private seller of a baseball card In 1994, to sell to a buyer one coast to another, for example?

A. In 1994 there were three primary technologies, the way I thought of It. There were bulletin boards, and that would be an electronic versions of bulletin boards as well of the, there was catalogs, and electronic versions of catalogs as well. And there was a television show called, the Home Shopping Channel. In my mind, each of those three had problems to really get people to sell coast to coast. In the bulletin board system, It's a lot like you [311] can pick up the VirgInian-Pilot today, and I'll use a motorcycle as an example, because I had a$500 motorcycle In college. You can pick up the Virginian on Friday, you see a motorcycle for sale, and you can call a person up and say, do you have the motorcycle? And the answer Is either yes or no. And that's fine, because It's an advertisement. If he says yes, well, you might be able to bug the motorcycle, but he's not under an obligation to sell me the motorcycle. I could go over there and say here's $700, I want to bug the motorcycle. And he can say, you know, talking about the motorcycle, I'm going to keep It for another summer. I don't want to sell It. And that's fine. That's what an advertisement Is, It's an Invitation to continue to negotiate. That's what I view as a person-to-person transaction, that you can pick up the newspaper.And there's an on-line version of

that, even when I was In college, of a bulletin board. But there's a problem in that there's an integrity problem In the author that—let's say for example you can run a three-day ad for your car In the Virginian-Pilot, and you can sell the car on Friday, and the ad still runs on Saturday and Sunday. And you just get calls all weekend. And that's okay. You just tell them, hey. I sold It on Friday. It's Just the way the ads run.

So to me there vas a problem with Integrity. And [312] it was the same problem that was there with electronic bulletin hoards, that you can see things on a board that was for sale last year. And an the on-line world, things had a way of staying forever, and you call somebody up and you say, well, I sold that motorcycle a year ago. you know. How do I get my ad off that bulletin board? And that's fine. That's, that was what was around.

The other thing was catalogs. And there were on-lIne versions of catalogs in '94 as well.' But I think the easier way to explain it, it Just, a catalog you can get in the mail to this day. You can pick up the catalog and call them up and say I want to buy this toy. And they say, I sorry, but we're out of stock. We didn't want to stop the Printing of the catalog and just went out in the mail. And that's fine, because It's really just an advertisement from a brand. like L.L. Beane. And they have some inventory things on it because they know how many items they have to sell. But it's really Just an advertisement as well.

The third thing was a television show like the Home Shopping Channel. And you can watch the Home Shopping Channel and there's a person there telling you about a figurine they want to sell, or a drill, and then they take orders over the phone where you call them up and you give them your credit card and you can buy the item. And I thought, wouldn't it be really cool to be able to pick up [313] the phone and, instead of buying, you can say I have a drill I want to sell. Can you sell It for me? And then the Home

Shopping Channel would say we have a drill we want to sell on behalf of this seller, and the Home Shopping Channel takes care of the credit card processing, they take of everything. Just tell me when It's sold. That was, that was the three things I saw. The Home Shopping Channel was what I was trying to Innovate on.

Q. And what, hr. Woolston, were your qualifications by education or experience that you thought enabled you to try to tackle some of those problems?

A. Well, I had been working in electronics and computers since I was 10, and I was, I think I was 30 at the time. So I had a lot of experience in computers and communications and computer networks. I also spent the last three years of the CIA working for the Counter Terrorist Center trying to figure out applications for our network to not just report on terrorism, but actually stop terrorism before It happened. So we spent a lot time thinking about how to use networks.

I had also written a voice-over-network application that I thought gave me the skills necessary to build an e-commerce system. It wasn't called e-commerce then, it was—that's a word that kind of came into parlance later on.

[314] Q. Well, when did you start the process of going about trying to solve those problems that you identified with electronic catalogs and the Home Shopping Channel and electronic bulletin boards?

A. It was that summer of '94. '94 was a very busy time for me, but I new about communication interfaces. That's a network card or other interface you put in a computer to allow a computer to talk to a network. I knew about databases, and I knew about credit card processing of course. I think we all did. We were all using credit cards back then. Wasn't used much on-line back then, but there were techniques to take credit cards on-line in '94 and '95.

I also knew about encryption. That's a way to secure theft-prone Information like credit card information that goes over the Internet. I knew that information was publicly obtainable. You could bug the RSA algorithm, the scrambling algorithm and put that in your system.

Q. Why did you decide eventually to acquire a patent on your solution to these problems?

A. Well, I thought It would be very helpful to small businesses and individual sellers, that a system like this would help out small business. I was from a small town, and one of the examples I used in mg patent application was that this was a big patent step forward for a person who maybe collected fountain pens and he lived in Lionel, Ohio. There [315] isn't a big market for collectible fountain pens, but maybe there was in Chicago.

So this system would help a small-town collector get to the bigger markets and get a fair price for his Item and sell them when he wanted to. To me, the notion of collecting was having the fun of buying and selling and kind of trading in and out of your collection as well.

Q. But why did you decide to get a patent on the solution to your problems?

A. I thought that was what you were supposed to do. I mean, I thought that was the first step that you needed to do to build a business. We file for a patent application, you organize a company around the idea, you would then try to get people interested In Invest log or Joining or, and then building a company.

Q. Describe for the jury, if you would, the process about how one goes about obtaining a patent.

A. Well, the U.S., United States Patent and Trademark Office grants patents. You have to file paperwork with them and they examine It.

Q. And what do you have to provide?

A. You have to provide drawings. In some cases

technical drawings, and descriptions of what you believe your invention is as to the text. Generally there's three levels of description. There's the very detailed portion on

* * * *

[336] file an international patent application to basically protect the rights of the company overseas.

This is a document that published in October of 1996?

MR. STILLMAN: We move admission.

THE COURT: All right.

(Plaintiff's Exhibit No. 645 received.)

BY MR. STILLMAN:

Q. Mr. Woolston, what is Aden Enterprises?

A. It's a company, California-company based in Omaha, Nebraska that we got associated with, MercExchange got associated with in 1990s. Early 1990s. No, 1999. Early 1999.

MR. STILLMAN: I think you may have a book on a wire or something again. We're getting some more interference. Is your microphone still working?

THE WITNESS: I think so.

MR. STILLMAN: Good. Okay.

THE COURT: It's not the latest technology.

MR. STILLMAN: It's a lot better than it used to be.

THE COURT: Sure is.

BY MR. STILLMAN:

Q. Take a look if you would at Exhibit 812.

A. Yes, sir.

[337] Q. I'm sorry, I just got passed a note that I forgot to do something.

Go back if you would and look at Exhibits 617 and 618.

A. 617 is—oh. That's an assignment from me to MercExchange Delaware, of what becomes the '265 patent.

Q. Okay. And what is 618.

A. 618 is the recordation of assignment, once again moving the rights in the '265 patent to MercExchange Virginia.

I go back to 617. 617 actually was an assignment from me of all the patent applications that could ever be claimed or issued patents from the original patent applications to the Delaware corp. And then 616 is the assignment of the patent rights from the Delaware L.L.C. to the Virginia L.L.C.

Q. Okay.

MR. STILLMAN: Your Honor, we move 617 and 618.

THE COURT: Admitted.

(Plaintiff's Exhibit Nos. 617 and 618 received.)

BY MR. STILLMAN:

Q. All right. Now let's go back to Aden Enterprises if you would, and Exhibit 812.

A. Yes, sir.

Q. What is Exhibit 812?

[338] A. This is an agreement between MercExchange and Aden Enterprises. It contains most of the terms, substantially all the terms that became a series of agreements between MercExchange and Aden Enterprises.

Q. Is it a license agreement?

A. Yes, sir, it is a license agreement.

Q. A license agreement to do what?

A. It's a license to all the pending patents, all the pending Inventions, all the issued patents, to Aden Enterprises. I think it's in a field of use of on-line travel.

Q. When you say all the patents, I need you to be specific. What patents are you talking about?

A. Well, it's quite a few. It's the original parent case, the

'620, it's the '265 patent, it's the patent that becomes the one, the patent application that becomes the '176, the patent application that becomes the '651, the patent application that becomes the '051, and any and all patents that could ever issue from the original filing date. It also gave them access to our business plans and confidential information.

Q. Okay. So among other things, this is a license agreement between MercExchange and Aden Enterprises for the '265 and '176 patents; is that right?

A. At least that, yes, sir.

[339] Q. Okay. And you mentioned that this was a field of use license. Would you explain to the jury what a field of use license is?

A. A field of use license is, you can define a term in a contract. Let's say you can use all the inventions in the on-line travel market. So we licensed them to all -anything that could happen in on-line travel, if they wanted to use one of the patented techniques or even one of the patent-pending techniques, they were free to use that.

Q. And were they free to use it outside of the area of on-line travel?

A. Right. That's the important part. You're not allowed to use it outside your field of use.

Q. Okay. What did MercExchange receive for that license?

A. We received some warrant in the company.

Q. What are warrants?

A. The right to purchase shares. Aden received a right to buy a percentage of MercExchange, 10 percent. And I believe there's a royalty provision in here as well that Aden and its on-line travel section agreed to pay MercExchange royalties.

Q. Now, when this document was executed, were you an officer in both companies, Aden and MercExchange?

A. Yes, I believe so.

[340] Q. What did you do? What was your position?

A. Well, it was chaotic. I think in October '99 I was held out as the CTO, Chief Technical Officer, of Aden Enterprises, and also some of the subsidiaries we were trying to get going.

Q. What was the principle business of Aden Enterprises?

A. It ended up being three subs. Three primary subsidiaries. There was Cheapfares—not Cheap Tickets, Cheapfares—which was going to be a PriceLine-like site where you could name your price for a ticket. And there was a company called LeftBid. It was an interesting play on words that Mark Borhee came up with. I didn't know at the time, you actually would leave a bid at a real auction, and it's sealed, and then as the auctioneers auction it off and continue, he says whoa, there's a LeftBid, and he can pull it up and open up the LeftBid. It was a fine arts vertical for primarily mid-tier auction firms like—I don't know if Sloane's is down here. Sloane's and Wexler's, and there's other ones of these medium-sized auction houses across the country. And then there was Navlet.

Q. What was Navlet.

A. Navlet was the, it started out being a company organized to exploit these inventions that myself, Mr. McEachern and Mr. Tarretts (phonetic) invented in October of [341] 1999. But it quickly got drawn into being the technical provider for LeftBid and-Cheapfares.

Q. Take a look at—

MR. STILLMAN: Your Honor, I move Exhibit 812.

MR. RANDALL: Your Honor, I understand your ruling. This comes in over our objection.

(Plaintiff's Exhibit No. 812 received.)

BY MR. STILLMAN:

Q. Take a look at Exhibit 813 if you would, sir.

A. Yes, sir.

Q. Could you tell the jury what that document is?

A. This is a license agreement between Navlet and MercExchange, L.L.C.

Q. And what is it a license agreement for?

A. It's a license agreement for the patents, at least the two patents we're talking about here today, and the pending patent applications to that subsidiary called Navlet in the field of use of infrastructure provider, which was a fancy term for saying it was tech, a technical company provider that provided the servers and the hardware and the like.

Q. And what did you receive, what did MercExchange received for the Navlet license agreement?

A. I believe there's a royalty provision in here. And it may or may not be a license issue fee. Oh, it [342] received some stock in Navlet as well.

Q. Did you receive a running royalty?

A. Yes, there's a running royalty provision.

Q. And tell the jury what that provision says.

A. Well, a patent has a limited life. It expires, and then anybody's free to use it. And during its life you can charge rent, as it were, to use it. So they were free to use it and then pay us royalties. Pay MercExchange royalties.

MR. STILLMAN: Your Honor, I move 813.

THE COURT: 813 is admitted.

(Plaintiff's Exhibit No. 813 received.)

BY MR. STILLMAN:

Q. Take a look at 814 if you would, sir.

A. Yes, sir.

Q. And tell the jury what that is.

A. This is an agreement, a license agreement to the patents between LeftBid and MercExchange, L.L.C. Again, it was similar to the Navlet agreement. They have a right in the field of use of fine arts, agreement to pay royalties.

Q. You say the field of use of fine arts. Tell the jury what that means.

A. Well, LeftBid was a company that was really this gentleman out of New York's idea, Mark Borhee. He saw an opportunity in these second-tier auction market—I [343] shouldn't call it second-tier. It's a tier of the market that's not served by the three—the two big players, which is Sotheby's and Christie's. They are the Sloane's and Wexler's of the world. There's probably one here-in Norfolk as well. An auction house that will liquidate an estate, sell paintings on your behalf. The concept was to put these live auction events basically on the Internet like television. It was a very challenging process to get the Internet to work like television. It was actually going to have a camera showing the auctioneer, the item, and there was a way for Internet participants to put bids down to the floor of the auctioneer.

Q. And what were the terms of the license agreement with LeftBid?

A. They agreed to pay us royalties if they used the inventions, and they gave us stock in the company.

MR. STILLMAN: Your Honor, I move 814.

THE COURT: Admitted.

(Plaintiff's Exhibit No. 814 received.)

BY MR. STILLMAN:

Q. Now, Mr. Woolston, did MercExchange ultimately wind up in litigation with Aden?

A. Yes.

Q. Explain to the jury how that happened.

A. Well, it was pretty chaotic. We had a gentleman [344] from Omaha, and I don't want to say anything bad about the guy, because he was a great, he had great strengths in his areas. And he gave us the opportunity to go try to make a run at building these companies. It got chaotic 'in that it got a little too chaotic. He was too inquisitive. He was trying to start too many initiatives. The real problem arose in this environment when we raised money in LeftBid. We had

raised money in the subsidiary LeftBid, and the shareholder base got fractured. So there were different shareholders in LeftBld than there were in Navlet, Cheapfares and Aden. And because we were under funded and under staffed, we ended up with conflicts of interest.

We were in a relation with relationship with Credit Suisse First Boston to help us. And Credit Suisse First Boston's advise was to pull the subsidiaries back into the parent, pull them into Aden Enterprises, by buying the stock and then running the subsidiaries as divisions. And that would remove the conflict of interest and the fighting or over scarce resources that was going on.

That required us to get proper corporate governance in Aden, to get a board in there. Myself and some other officers wanted a strong CFO reporting directly to the board and to run it, you know, responsibly as a public company.

Ultimately I wasn't able to get that done, and I [345] couldn't resolve my disputes with Mr. Luther, so we ended up litigating against each other to basically pull the companies apart. We had to get MercExchange out. We couldn't, we couldn't do it In that environment. And Mike didn't want to, didn't want to fix Aden. So we fought.

Q. Well, did Aden breach its license agreements with MercExchange?

A. Yeah. In fact, we terminated the license agreements for violations of the nexus clause. They were not using the patents. They were not using the '265, they were not use the '176, he wasn't using the pending patent applications. So we terminated the licenses on those grounds and for failure to pay royalties.

Q. So those license agreements with Aden are no longer in effect?

A. That's correct.

Q. How much did MercExchange receive as a result of the breach of those agreements?

A. Well, it's tough to say. We, we, it was a very complicated relationship between the four companies. We ended up receiving 31.2 million. We got the, we got control, or we got a full assignment of the four other inventions that myself, Mr. McEachern and Mr. Tarretts had invented in October of '99. Those were assigned to MercExchange. We got rights to the copyrights for the [346] software code of LeftBid and Cheapfares. We ended up with a copy of the server as well, which is all the half-formed business plans and other Information we acquired in that enterprise.

Q. Did MercExchange, has MercExchange, prior to this suit, ever had to sue to enforce its patent rights before?

A. Yes.

Q. When?

A. About two and a half gears ago we enforced the '176 patent, that's the search patent, against a company called GoTo.com.

Q. And did you file a suit to enforce that patent?

A. We did. We filed it here, in Norfolk.

Q. And what was the resolution of that suit?

A. We, Mike and I ended up talking with the principles and they told us they were getting out of that market. They were getting out of the search market for the '176 search market. Primarily it was a company called I Auction Rover that did what they call a cross-auction search. It searched more than one auction. They told us they were getting out of that market because, well, it became economically unviable.

MR. RANDALL: Your Honor, I'm going to object. I don't mind him saying what he did or didn't do, but he's talking about what someone else told him.

[347] THE CQURT: I think he's got to be careful about hearsay.

MR. STILLMAN: I agree.

BY MR. STILLMAN:

Q. Don't talk about what other people told you that aren't present.

A. Qkay. It was our understanding that they were getting out of this market. Ye believed them, because we looked at the same economic—it didn't, this market had failed to make economic sense after eBay made it cost prohibitive to be in this market. We agreed to a compromise on damages, and they paid us that compromised amount and we settled the complaint.

Q. And how much did you receive for that?

A. We received 84 million for that.

Q. And in return for that did you give GoTo any field of use license?

A. I don't know if we did or not. I think, I think we might have. We might have given them license to '176, but they weren't really going to use it. I mean, they gave us the economic reasons why they were getting—well, we had understood the economic reasons why they were getting out of it and we believed them.

Q. Okay, sir. Mr. Woolston, have you ever had any discussions with eBay or has MercExchange had any [348] discussions with eBay about its interests in obtaining the license to the MercExchange patent portfolio?

A. Yes.

Q. When was that?

A. Mr. Phillips was put in touch with a Jay Monahan and a Brad Handler, I believe.

Q. Who Is hr. Phillips?

A. Mr. Phillips was an attorney that was with the company. I had actually pulled him away from a very good Job at a law firm to go do our dot coo. He was, he's a reluctant entrepreneur, but I got him to come along. And a friend of mine.

Q. And when—well, did that result in any meeting or discussion with eBay?

A. Yes. It finally culminated in a meeting with eBay. We initially tried to trade them rights to the '176 patent for rights to—we needed access to eBay to build our Navlet system. Now, this is the Invention that I was talking about that we Invented in October 1999. And without eBay's cooperation, it wasn't going to be economically viable to build It. They said no, they didn't want to do any relationships. They viewed it as a straight purchase of intellectual property, they Just wanted to buy the patent from us, they didn't want any relationship with us.

Q. Let me ask you to take a look at, we're going to [349] show the Jury, Exhibit 621, which I think is bar code 1185.

Do you have Exhibit 621 there?

A. Yes, sir.

Q. What is that, sir?

A. This is an email from Andrew Kumamoto.

Q. Who Is Andrew Kumamoto?

A. He's an attorney at hr. Randall's law firm, was acting on behalf of eBay to buy our patents. He was sending us this email to set up this meeting. We were—I was kind of surprised they knew about all our pending patents. They had done their, they had done their homework. And we were very excited to meet with them.

Q. Let me—

MR. STILLMAN: Joe, If you could blow up the second paragraph of that letter.

BY MR. STILLMAN:

Q. Read that to the Jury if you would, sir.

A. 'EBay is interested in acquiring the family of applications related to U.S. patent No. 5,845,265. That's the '265 patent we're talking about today.

MR. STILLMAN: And Joe, could you pump up the second paragraph?

BY MR. STILLMAN:

Q. And read that sir, if you would.

A. Which paragraph?

[350] Q. The second paragraph—the third paragraph, I'm sorry.

A. EBay understands that this portfolio includes at least the following pending patent applications: Serial number '820, filed 12/1/98; serial number '779, filed 10/6/98; serial number '014, filed 2/19/99; serial number '015, filed 2/19/99; serial number '021 filed 2/19/99; serial number '057, filed 2/19/99; serial number '573, flied 3/18/99, and serial number '564 flied 10/15/99.*

Q. Now, do you know how eBay learned about those pending applications?

A. The only place I figured they could learn about I those was from a public filing we did of these license agreements with Aden Enterprises.

Q. Explain to the Jury what you mean by a public filing.

A. Aden was a public company. It was—

Q. What does that mean?

A. Well, it, we—if you're a public company, you are regulated by the Securities and Exchange Commission. We have obligations to issue financial reports, material events of the company and other important things that happen with the company. You have to publicly disclose that on a quarterly and annual basis, provide annual reports. It's a company that you and I could own shares in. It's publicly [351] traded. Then you get the annual report and you can find these filings, you can find them on-line now at the Security and Exchange Commission.

Q. Okay. Now, referencing the pending applications that are included in this letter from Mr. Kumamoto, at the time that this letter was written, what patents had actually been issued to eBay to you, sir?

A. I think just the '265 patent.

Q. And does this reference, this letter reference any understanding or knowledge or interest in the '176 application?

A. Yes. The '176 application we had actually given them the allowed claims. We had actually given those to Mr. Monahan, I believe. We told him that these claims had been approved by the Patent Office and it was going to issue as a United States patent. I believe that's serial number—hmm. I don't know the serial number's on the -it's one of these.

Q. Okay. Now, in June of 2000 when this letter was written, sir, did you have any understanding or belief as to whether eBay was infringing the '265 patent?

A. I did.

Q. What was it?

A. In June 2000 they were not infringing the '265 patent.

[352] Q. Why do you say that?

A. Well, you need to have—we don't have the 26 claim up there. You need to have the transaction processor .and it has to be offered in a fixed price format. On a buy it immediately or buy it now format. We had other patents on auctions. For example, the '176 has an electronic auction element where it has the search and electronic auction. But that's not what the '265 is about. The '265 is about fixed price, buy it now, with a transaction processor.

In June of 2000 they didn't have a transaction processor, I don't believe, hooked up to the eBay system. They weren't intermediating payments between buyers and sellers.

Q. What about the '176?

A. I don't believe they were infringing the '176. They certainly—

Q. 176 wasn't issued, was it?

A. Right. You can't infringe a patent that isn't issued.

MR. STILLMAN: Your Honor, we move that exhibit.

THE COURT: All right.

BY MR. STILLMAN:

Q. Now, I'd like to ask you a series of questions about your claims in your inventions, Mr. Woolston, and if [353] you need to reference those claims or take a look at your patents, feel free, but if you can answer them without reference to that, that's okay.

Is there anything in your claims, nr. Woolston, which requires—

THE COURT: We're talking about the '265 now?

MR. STILLMAN: Yes, sir.

BY MR STILLMAN:

Q. In fact, some of these questions actually may have application to both the '255 or to the '176.

Focusing on the '265 for a moment, Is there anything In your claims which require a trusted intermediary to take physical Possession of the goods?

A. No, sir.

Q. Why Is that?

A. Well, the whole thrust of the '265 patent Is that there's a posting terminal that's a personal computer; that a seller presents an Item to market electronically. The intermediary is my computer go-between. Now, like I said before when I was explaining the difference between my invention and a classified advertisement or Just a regular web site, it's that when a seller puts something up for sale in the '265 system, It's a promise. It's an obligation to perform, to deliver the item. If the system processes payment on behalf of the buyer, the system basically alerts [354] the seller after the process payment the Item Is sold. You have an obligation to perform on your promise to deliver the item to the buyer.

Now, that's a big deal. That's a big distinction over a classified ad because In a classified ad there is no obligation of the seller to actually perform on it. It's Just an adver-

tisement. It's an invitation to continue. And so in an advertising system, there's no integrity in the offers; meaning that ad can run Friday, Saturday, Sunday and from a buyer's perspective It's not marked as sold. It didn't change. It's still there. looks like It's for sale, and you end up pestering the seller. How that's what I mean by person-to-person.

Now, If you mean person-to-person that the "to" is the '265 intermediating the payment Forcing the obligation on the seller that, if the system processes the credit cards, buyer's credit cards on behalf the seller and then tells them It's sold, that that "t", that "to" is our invention. That's our trusted intermediary. That's what we mean by person-to-person, where the 'to' is our computer go-between, as It were.

Q. Okay. I want to make sure I have an answer to my question. is there anything In pour claims which require a trusted intermediary to take-physical possession of the goods?
[355] A. No.

Q. How, with respect reference to the specification In the '265 patent, you beard fir. Randall during open statement talk about embodiments?

A. I did.

Q. What are embodiments?

A. Examples, basically, of how the system can be used In different ways.

Q. Are there any embodiments in the specification which envision the possibility of an Intermediary taking physical possession of the goods?

A. Yes.

Q Okay. Are there embodiments or examples In the specification where an Intermediary does not take physical possession of the goods?

A. Yes.

Q. Let me ask you this: With respect to the claims of your invention of the '265, Is there anything In the claims of

the '265 patent which require an intermediary to, quote, 'check the legal title' of the good for sale?

A. No.

Q. Is there anything in the specifications or the embodiments expressed In the specifications wherein an Intermediary could check the title?

A. Yes, probably.

[356] Q. Referring to the claims of your Invention, again with respect to the '265, how does the trusted Intermediary Illustrate or tell the market that a good has, In fact, been sold?

A. Do you mean the trusted Intermediaries? The computer go-between in the '265.

Q. Yes, sir.

A. Hell. It modifies the data record.

Q. Now, what does that Dean when gnu say 'it modifies the data record'?

A. It narks the item as sold. And then notifies, there's a notification step as well that notifies the seller that the Item has been sold.

Q. Now, during opening statements you heard Mr. Randall talk about the Fleanet business plan did you?

A. Yes, sir.

Q. What was the Fleanet business plan?

A. Fleanet was the original name of the company before we renamed it MercExchange. I always loved that name. Yes, it was a Fleanet business plan. In 1995, '96, when it was still Fleanet, It vas a plan to go after target markets. I mean, the target market was obviously small stores that had a lot of things to sell on-line, like a pawn shop or a consignment store.

Q. Was the Fleanet business plan designed to be a [357] complete commercialization of your Invention?

A. No.

Q. What Is the relationship between the Fleanet business plan and the claims in your Invention. If any?

A. Very little.

Q. Is there any requirement In the claims of the '265 patent, Mr. Voolston, for a trusted Intermediary to take physical possession of the goods?

A. No.

Q. Could you explain to the Jury what a transaction processor is?

A. Cell, generically it could mean quite a few things. Could just mean a credit card terminal at a store. Our transaction processor is very specific. It is a transaction processor that is linked into these other elements of the claim. Ours is linked in because it actually processes payment on behalf of the buyer or on behalf of the seller without having to give the seller your credit card number.

Q. At the time that you disclosed a Integrated transaction processor as an element of your claims In the '265 patent, did eBag have an Integrated transaction processor?

A. What was the question again?

Q. Yes. At the time that you disclosed an integrated [358] transaction processor as an element of your claims, did eBay a have an Integrated transaction processor?

A. No.

THE COURT: Why don't we take 15 minutes. Are you at a good point?

MR. STILLMAN: I'm pretty close to being done, but I'm happy to cone back. It's your call.

THE COURT: All right. Hell, I think—I try to break about halfway In between the morning and the afternoon, and I think it would be a good time to do that.

MR STILLMAN: That's fine.

(Jury left the courtroom.)

THE COURT: We're going to have to be very conscious of that, because I understand one of the Jurors is a diabetic, and every so often needs to eat something, and obviously some

sugar, maybe, or something like that. So I've given permission for that person, so If you see somebody eating something—I don't even know who it is, frankly but If you see someone eating something, I usually wouldn't allow that, but Or. Johnson vas asked about that, and certainly we don't want anyone to have a problem. So obviously someone who Is a diabetic knows when they need something, and If we see someone eating It's because that I person needs to eat because of their medical condition.

So I'd like to break, just so we know, If we're

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[386] mean, we, I've read the patent and I saw the U.S.—that's the information that's been provided to me.

Q. You didn't read any of the articles about it?

A. Read the transcript of the Today Show.

Q. Yeah, but there's plenty of articles about it. You didn't read any other article about it?

A. No.

Q. All right. If you had known about the Nahan patent or the Today Show transcript, you would have cited it to the examiner, wouldn't you?

A. Probably.

Q. You would have submitted it to the examiner just to make sure, whether the examiner would have issued a patent or not, right?

A. Probably.

Q. And you would have been obligated to give that to the examiner, right?

A. I don't know.

Q. You don't know?

A. No. It's a claim by claim analysis, Mr. Randall. It's material to the claims. You are under a duty to disclose art. You're aware it's material to the claims.

Q. That's right. Now I'm asking you, sir, you've read that application, you filed the application for the '265, right?

[387] A. Yes.

Q. You wrote the application right?

A. Yes.

Q. You prosecuted it, right?

A. Yes.

Q. You're a patent attorney, right?

A. Yes.

Q. You've read the Nahan patent and read that Today Show transcript, right?

A. Yes.

Q. You telling me you don't know whether you would be obligated or not to disclose that as material prior art to '265?

A. Well, it's rather cumulative of the art that's in record. The Lindsey reference and the Lalonde reference were the two primary references used by the Patent Office to examine the '265. I don't see how Nahan is much closer to the core of the invention of the '265.

Q. You think that the Patent Office had everything in one system, in one system, that the Nahan patent and system taught before it? Is that what you're saying?

A. No. But for the purpose of examination, the Patent Office will often combine prior art systems to try to render your claim, what they call obvious and non-patentable. The combining of Lindsey and Lalonde is [388] actually much closer to the claimed invention than the Nahan is.

Q. It's "Nahan" by the way.

A. I'm sorry. Nahan.

Q. That's all right.

So knowing everything you know, you don't feel like you would have been obligated to disclose the Nahan system to the patent examiner in '265? Is that what you're saying.

A. No, I probably would have disclosed it in an abundance of caution.

Q. Okay. But you wouldn't have felt an obligation to do so because it was material art; is that what you're saying?

A. I said I would, probably would have done it in an abundance of caution.

Q. I understand you would have done it, but the question is, would you have considered that material art to the patentability of the '265. Yes or no?

A. Yeah, I probably would have.

Q. All right. Did you keep up, at the time you conceived of your invention, at the time did you keep up with the search agent technology?

A. At my conception?

Q. Yes.

* * * *

[394] those in a few hours of searching and reading. Do you know that?

A. I didn't know that.

Q. He didn't ever tell you that?

A. No.

Q. He said he used Lexis and Nexis search service to find them. Did you know that?

A. I did not know that.

Q. You never, the time you came up with your idea, you never went on the Lexis/Nexis—strike that.

At the time you came up with your idea, you had access to Lexis and Nexis, right?

A. Probably.

Q. That's a service that you log onto your computer and you look for articles and things like that, right?

A. Patents too.

Q. And patents also?

A. Yes.

Q. Okay. You had access to that, right?

A. Yes.

Q. You were trained at searching for prior art, right?

A. Not trained, but yes, I could search for it.

Q. At the time you came up with your invention, you conceived of your invention, you had looked at and [395] prosecuted hundreds of patents, right?

A. No.

Q. Not hundreds?

A. I don't think I prosecuted any patents when I came up with my invention. It was the first patent application I had ever written.

Q. And you didn't do any prior art searching on the Internet?

A. I'm not even sure Google was on-line in 1995.

Q. That's not my question.

A. I don't even know how you would have done an Internet search in 1995. I mean, I knew how to do Lexis and Nexis search. I knew how to get that patent database. Lexis had that. I could search that.

Q. You what?

A. I could search that.

Q. All right. So did you go on-line through Lexis or Nexis and search for articles about this new idea that you had when you came up with the software search agents?

A. No.

Q. Did you know that your expert, Dr. Palmer, said that these articles I just referred to were fairly widely read and available publications? Do you know that?

A. No.

Q. He said a person of ordinary skill in the art [396] would be aware of them.

A. Okay.

Q. You weren't aware of them, am I right?

A. I don't believe so, no.

Q. And you didn't look for any, right?

A. I don't believe so, no.

Q. Now, had you known about these articles, would you have still filed an application for this patent?

A. Definitely.

MR. STILLMAN: I don't think that's a proper question. He said he didn't know about them, and now he's being asked a hypothetical about if he'd known about them, what would he have done. But if he doesn't know them he wouldn't --

THE COURT: There's been enough questions about it. I think it's an appropriate question.

A. Definitely.

BY MR. RANDALL:

Q. You still would have filed it?

A. Definitely.

Q. But you would have cited all these knowing that they are material art, right?

A. Probably.

Q. You don't know?

A. I don't know what references you're talking about.

* * * *

[407] '86.

You've read this article a number of times, right?

A. Yes.

Q. How many times?

A. 10.

Q. All right. And you understand that this article is about the ACORN network service that was a trusted intermediary that auctioned off used collectables—sorry. Auctioned off coins in the mid '80s, right?

A. That's your characterization.

Q. Well, what did you understand it as?

A. Well, Mr. Blankley, the trusted intermediary is Mr. Blankley. He physically took the item and required that he take the item and he personally put it into his network.

In the "265 system—

MR. STILLMAN: I'm just asking you—

A. The trusted intermediary—can I—

Q. I'm just asking you about what you understood this article to mean. Not your system, just this article.

A. That is my understanding.

THE COURT: I think he's answering the question. Go ahead.

A. Mr. Blankley is the trusted intermediary. In our system the trusted intermediary is the computer go-between.

Q. Well, in your system that you described in your [408] application, somebody, a consignment node user, inspects the goods and adds value to the description, right?

A. That is one example. That is not what is in the claim.

Q. Getting back to the ACORN network, did you understand the ACORN network to be a trusted intermediary online auction system?

A. Actually Mr. Blankley was the auctioneer. This system is a lot like Leftbid. The way I understand this is that Blankley took messages from users physically, did the calculations, this is a higher bid, and then he reposted it. It's much like a bulletin board except Mr. Blankley himself is the auctioneer, and Mr. Blankley himself is the trusted intermediary.

Q. Well, Mr. Blankly—you sat through his deposition, right, sir? You traveled to Tennessee—

A. Yes, I did.

Q. Strike that.

You traveled to Tennessee, you sat through his deposition, right?

A. Yeah. I met the man.

Q. And you also traveled to Tennessee and sat through the deposition of Mr. Mintz, who also helped develop this system, right?

A. Yes, I did.

* * * *

[447] A No. I believe we did, in the declaration.

Q I'm just talking about in this case. In this case, during your direct testimony, you didn't provide any evidence to the jury of corroboration that you, in fact, came up with these inventions in the summer of '94, right?

A I don't think we put into evidence those early documents, right.

Q Okay. So the answer to my question is you didn't present any evidence corroborating your story, that you invented these concepts in the summer of '94 during your direct examination here in front of the jury, correct?

A That's essentially correct. We didn't put in those documents.

Q. All right. Let me ask you a few questions about your story, about how you invented these concepts and we'll compare it to Dr. Keller. In the summer of '94, when Dr. Keller was working at CommerceNet, you were in law school studying patent law; is that right?

A Well, I don't know where Dr. Keller was in the summer of '94. I finished my academic studies in the fall of '94, and I was actually working and studying for the bar exam in the spring of '95.

Q Well, you did read Dr. Keller's declaration in the Goto.com case about what he was doing in the summer of '94, right?

* * * *

THE COURT: It hasn't been as much of a problem as, frankly, going over the same thing over and over again. So let's just—if you need to look at the pretrial order, and frankly, Mr. Stillman, if there is an exhibit that wasn't objected to or that an objection was overruled, then it comes in. We can't keep doing this.

MR. STILLMAN: I hear you.

THE COURT: Okay. All right.

(Court recessed at 11:35 a.m., until 11:50 a.m.)

(Whereupon, the jury returned to the courtroom.)

THE COURT: Mr. Randall.

MR. RANDALL: I'd like to move into evidence Defense Exhibit 323, which is the Kupfer search agent article that we previously discussed, and Defense Exhibit 545, which is a document that we just discussed regarding the two applications, the April and November application.

THE COURT: All right.

MR. RANDALL: Thank you, Your Honor.

(Defendants' Exhibits 323 and 545 were received.)

BY MR. RANDALL:

Q Mr. Woolston, the system that you invented was going to cost a lot of money, right?

A Which patent are you talking about?

Q The '265.

A The cost to build?

[488] Q Yes.

A I think it would cost a fair amount of capital to get the energy and the time and resources to develop it.

Q And the same thing with the '176, correct?

A Well—yes. The way I disclosed it, you wouldn't build the '176 until you had the '265.

Q All right. And you were busy working at the Howrey & Simon law firm at the time you came up with these inventions?

A Yes, among other things.

Q You didn't have time to sit down and write a code, software code for these inventions, right?

A I don't know if I had the time or I didn't have the time.

Q All right. But you didn't do it, right?

A No.

Q Until you tried, you didn't know whether your system would work as described in your patent, correct?

A No.

Q That's not correct?

A No, it's not correct.

Q You had never built—at the time you filed your patent applications, you had never built an e-commerce system before, have you?

A I built a very sophisticated Voiceover X25 system, so I was confident that this could be built.

Q We can move faster if you answer my question. At the

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[490] was?

Q You had no experience at the time you filed your applications making a system, building a system to transfer ownership of an item, correct?

A All it does is modify the data record. I had a lot of experience in modifying data records.

Q You had no experience at the time you filed your applications in making a system to search for a good in a plurality of databases? You never done that before, correct?

A I had never written those software search agents, that's correct.

Q One of the things you did after conceiving your invention, you created your own company called Fleanet; is that right?

A Yes.

Q And Fleanet didn't have any employees other than yourself, correct?

A That's correct.

Q And you still—at that time, when you founded Fleanet, you still had another full-time job, right, at Howrey & Simon

A When?

Q When you founded Fleanet.

A I believe so, yes.

Q And the point of you coming up with Fleanet was to i implement your inventions, correct?

[491] A Correct.

Q It was a business plan to attract capital and people and build e-commerce systems, yes.

MR. RANDALL: Can you play clip number 175, please?

MR. STILLMAN: Excuse me.

THE COURT: Stop.

MR. STILLMAN: I don't think this is proper 3 cross-examination, to just start playing deposition transcripts.

THE COURT: It isn't.

MR. RANDALL: Okay.

THE COURT: You have to some basis for doing that. If he agrees, then there is no reason to do it.

MR. RANDALL: Okay.

BY MR. RANDALL:

Q The point of starting Fleanet was to implement your inventions, correct, yes or no?

A Not necessarily. The point of starting Fleanet was to attract capital, attract people and talent necessary to build e-commerce, any e-commerce company here in Virginia.

MR. RANDALL: I have a straight answer on the video-tape. Can I just move to that?

MR. STILLMAN: I think you got a straight answer.

MR. RANDALL: He said not necessarily. I did it to raise capital.

[492] THE COURT: Do you have the deposition, the written deposition so he could look at it before you play it on the screen?

MR. RANDALL: Let me ask the next question.

THE COURT: Go ahead.

BY MR. RANDALL:

Q You wrote Fleanet business plans to implement your inventions, correct?

A Yeah. That was one of the goals of Fleanet, was to go I build the inventions.

Q All right. That was the answer to my question. Second question was you wrote Fleanet business plans to implement your inventions, correct?

MR. STILLMAN: I think that's the same question, Your Honor. He's asked and answered that question now three times.

THE COURT: What's the difference in the question?

MR. RANDALL: The first question was he founded Fleanet, the company. You founded that to implement your inventions, and I don't know if I got a clear answer on that.

THE COURT: Okay.

MR. RANDALL: And the second question was, You wrote I business plans for Fleanet to implement your inventions, and I I still don't have an answer from that.

BY THE COURT:

[493] Q That's why you wrote the business plans for Fleanet, to implement your inventions, correct?

A That was one of the goals. And to explain the goals of the company, to attract capital and people, yes.

Q You sent a letter to Basil Hosmer talking all about your inventions, correct?

A I don't know which document you are talking about. I'm pretty sure I sent it. I'm just not sure I sent that one.

Q Can you pull up Exhibit 352, please. Now, I'd like you to look at this letter, and it's a letter on Fleanet letterhead, and it's to Basil Hosmer, Jr.

A You are going to have to enlarge that.

Q The letter starts out, Please find enclosed a patent filed April 24, '95 entitled consignment nodes. This letter outlines a business plan to accompany the consignment node invention. Do you see that?

A I see that.

Q Do you recognize this letter, sir?

A I recognize it came off a computer we had. I know this —letter was never sent because the filing date on the patent is wrong.

Q I'm not asking you right now whether you sent the letter. I'm asking do you recognize this letter?

A I recognize it. It is something off our server, yes.

Q You produced this in discovery, correct?

[494] A I believe so, yes.

Q And you have read this letter a number of times, correct?

A No.

Q Well, you read it in your deposition a number of times, correct?

A Yeah. Yes. I do believe you went through this letter in my deposition.

Q And this is a business plan outline for your inventions, correct?

A Well—

Q Or a draft?

A When you say inventions, it's kind of a little misleading, Mr. Randall. This was for Fleanet. It is a business plan for Fleanet. It's not even a business plan—

THE COURT: You need to speak up.. The jury can't hear you.

THE WITNESS: I was trying to get Basil Hosmer interested in helping me.

MR. RANDALL: Your Honor, I move Defense Exhibit 352 into evidence.

THE COURT: All right.

(Defendants' Exhibit 352 was received.)

BY MR. RANDALL:

Q Mr. Woolston, Basil Hosmer, he was a friend—he was a brother of a friend of yours; is that right?

[495] A Yes. He was a brother of Andy Hosmer.

Q And you didn't want to mislead him, did you?

A I wanted to promote the company to him and get him I intrigued in the business concept.

Q Right. You wanted to write him about your inventions to get him strike that. Why did you write this, sir?

A So get Basil Hosmer interested in helping the company build an e-commerce company.

Q And you wrote this at the time you filed your—at or about the time you filed your April '95 application, correct?

A Probably. I'm not sure.

Q You are not sure. Let me refresh your recollection with a testimony—

MR. STILLMAN: Excuse me, Judge. Why don't we just 5 move on and say—he said probably. We'll stipulate that he 5 wrote it. It's not worth going through.

MR. RANDALL: Okay. That's great. I'll take that.

THE COURT: Second stipulation.

BY MR. RANDALL:

Q Starting in 1995, you did everything you could to start a business and build the invention, right?

A I did everything within my powers. I don't know if it was everything I could have .done, but I tried, yes.

Q The statements you made to Mr. Hosmer in this letter, they were true, correct?

[496] A It was a document to get Basil interested. I haven't read this document since my deposition. Yeah, I would say that it's generally true about the Fleanet business.

Q Well, would you like me to blow this up and make sure? I want to make sure there aren't any false statements that you made to Mr. Hosmer about your inventions.

MR. STILLMAN: Excuse me. Let me object to the four of the question. I don't think it's ever been established that he sent the letter.

THE COURT: That's right.

MR. STILLMAN: So he didn't make the statements to Mr. Hosmer.

THE COURT: I think you asked and he answered that he didn't think he sent the letter, and that he maybe -- you even used the word draft.

BY MR. RANDALL:

Q Any there false statements in this document that you wrote, Mr. Woolston, about your invention?

A Well, what makes me sure that I did not send this letter to Basil is that the filing date is wrong on the consignment node.

Q I'm not asking you right now whether you sent the letter. I'm just saying are there any statements in this letter that you wrote that are false?

A The first line is false. That's not the date of the

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[502] offer you this right exclusively and that you can generate revenue by being the person allowed to post into the electronic market. So yes, it's true to the extent that Fleanet had that original marketing goal.

Q Well, you started Fleanet to implement your inventions and you wrote business plans to implement your inventions, correct?

A Fleanet was a business plan to implement aspects of it, yes.

Q Including this exhibit, correct?

A I don't know if I sent this, but I did write this around the time frame.

Q And that statement I read into the record from the fifth point there, that was accurate at the time you filed your applications, correct?

A It was accurate, that this was the marketing pitch of Fleanet that was going to give a value added proposition to small stores, yes.

Q But the point I'm really looking at here, and you know we talked about it in opening and so forth, is i.e., the post of a sale for good—I'm sorry, i.e., the post of a good for sale means it is in the hands of a trusted bailee and is for a fact available for delivery if a purchase is made. That statement was true when you wrote this document, which was at the time you filed your application, correct?

[503] A It's just like ReturnBuy. Yes, that was the Fleanet business plan goal.

Q So your answer to my question is yes, that's right?

A Yes. That was the Fleanet business plan goal.

Q After you tried to get Mr. Hosmer excited about your inventions, you tried to get others interested in your inventions, correct?

A Yes.

Q In January '96, you sent your Fleanet paper to Bob Smith at MCI; is that right?

A I don't know. If you have a document to show me, that would be helpful.

MR. RANDALL: Pull up D144. I never liked that sound.

THE COURT: That's a bad sound.

BY MR. RANDALL:

Q All right. What's up on the screen, Mr. Woolston, is a document that's exhibit—Defense Exhibit 144, and it shows a date of January 15, 1996, from you to Bob Smith at MCI. Do you recognize that e-mail, sir?

A I did correspond with Bob Smith at MCI. I'm just not sure of the date on this, but it's around the right time frame.

Q All right. So in January '96 you sent your Fleanet paper to Bob Smith at MCI; is that right?

[504] A We had telephone calls and I believe I sent this to him. I'm not sure, but yes.

Q Well, you state in your message to Bob Smith at MCI, Thank you for making time in your busy schedule to hear about Fleanet. I was very pleased to hear your insightful thoughts and comments. As we discussed, I have attached a small paper about Fleanet. Do you see that?

A Yes.

Q Okay. So you wrote this and you sent it to Mr. Smith at MCI, correct?

A I believe I wrote this, and I might have had some help from Herman Crank.

MR. RANDALL: Your Honor, I move Exhibit 144 into t evidence.

THE COURT: Okay.

(Defendants' Exhibit 144 was received.)

BY MR. RANDALL:

Q By that time, eBay had been running auctions on the World Wide Web for several months, correct?

A I don't know.

Q You hadn't written any code for your consignment node patents as of that time, correct?

A I don't know if I had or not. I had a rapid application t development platform that I was working with.

Q When you wrote to Mr. Smith, you indicated that you were

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[509] I mean, I thought being invited to join something made him feel special. It would help the small businesses feel

special, that they were getting some value from MCI if MCI builds the '265 system, basically.

Q Well, the sentence here, The market maker only allows reputable dealers to post goods for sale in the electronic market, that statement was true about your inventions, correct?

A No. It's true about the pitch I made to MCI.

Q Directing your attention to page 3, paragraph 7. You gave MCI a competitive analysis; is that right?

THE COURT: I can't read it.

THE WITNESS: I don't recall.

BY MR. RANDALL:

Q I'm directing your attention to the portion of your presentation to MCI where it says competitive analysis. Do you see that?

A Yes.

Q You wanted to be honest in what you said, correct?

A Yeah. I wanted to get a relationship with MCI. I think you start relationships with honesty, yes.

Q You didn't want to mislead them, right?

A No.

Q You didn't want them to invest money in your company based on false statements, did you?

* * * *

[513] it, which is a Web site that just takes credit cards—that a person who has his own Web site takes credit cards over the Internet does not infringe the '265 patent.

Q Well, what you say is if they don't do speculating. Using a server in a pure retail mode, e.g., no speculating. You didn't invent this pure retail mode, correct?

A No, I probably did not.

Q EBay doesn't do this speculating function of your inventions, correct?

A Yes, they do.

Q They practice that?

A Yes, they do.

Q So let me ask you this. If a business does not do the speculation function, they operate purely in a retail mode, then your consignment node invention does not cover that, right?

A If you have a Web site, that you take credit cards on your personal Web site, you don't—you probably don't practice the claims of the '265, so you probably don't infringe.

Q In December of '95, you sent a business plan to Paul Shearman Allen, a lawyer, outlining a business plan to attract a buyer or investor to your system; is that right?

A If you show me a document, I'll help you.

MR. RANDALL: Pull up D358, please.

[514] BY MR. RANDALL:

Q This is a letter dated December 17, 1995.

A Is this the signed letter?

Q To Paul Shearman Allen.

A Is this the signed one? Yes.

Q You have seen this document before; is that right?

A I believe I wrote it.

Q All right. You wrote it and you sent it on or about December 17, 1995, correct?

A I believe so, yes.

MR RANDALL: I'll move Defense Exhibit 358 into evidence, Your Honor.

THE COURT: Admitted:

(Defendants' Exhibit 358 was received.)

BY MR. RANDALL:

Q You write on the first page, You have asked me to provide a business plan and outline to attract a buyer or investor of the invention we previously discussed. Do you see that?

A Yes.

Q At that time, were you aware that eBay had been running for months, up and running on the World Wide Web for months?

A I still don't know if they were up and running for months at this time.

Q Did you want to be as honest as possible in making these statements to Mr. Allen about your Fleanet inventions?

* * * *

[517] A Actually, there is two versions of it. There is one version that's for big sellers that provides an inventory software piece that has a bar coding feature in it that allows them to move a lot of goods in and out of the electric market, and there is a simpler claim version of the posting terminal that doesn't have the bar coding, reader, scanner, printer.

Q You provided Mr. Allen with information about how much it would cost to operate the posting terminal, market maker) system each month, didn't you?

A I might have.

Q Can you go to the monthly overhead section. Here at Table 2, at Table 2 you provide Mr. Allen with the information about the monthly operating cost of a posting terminal market maker system, and you list as this overhead, monthly overhead of $114,100, correct?

A Yes. It included power, floor space, staff, bandwidth.

Q Is that correct, sir?

A Yeah, that's what I thought.

Q And that information that you provided to Mr. Allen indicated that it would cost 80,000 a month for staff people to receive the goods and vouch for the goods and do all the other things that had to do with running a posting terminal service, correct?

A That must have included a sales staff. That seems like a pretty big number, 80,000 a month.

[518] Q Well—I'm sorry. Were you finished?

A Yes.

Q That overhead cost for staff would include the functions of those people receiving the goods and vouching for the goods and doing all the other things that you would have to do to run a posting terminal service, correct?

A No.

Q It didn't include all of those?

A No.

Q What did it include?

A I believe—and it's been a long time since I have read this document. This was the company. This was to fund the company. We thought we needed a sales for—of course, the computer go-between had to run and maintain that. He probably i had to run and maintain the software, so you need some i engineers. We had—that's a pretty big number. That must have been a pretty big sales staff number.

Q You already have sales cost listed there, sir, don't you, as $10,000?

A That's cost. That wasn't salaries, I don't think. It's travel, meals, cost of sales.

Q And what would this sales staff for $80,000 a month that's what you say that's for. The staff, you say that's a sales staff figure?

A I don't really recall one way or the other, Mr. Randall. [519] It seems like it would have to include a sales staff in there.

Q But what would the sales staff be doing?

A Be selling the service to small stores, going to pawn shops, knocking on the doors saying, hey, we got this great value added proposition for you. We have electronic market. You can have access to markets outside your own geography vii the Internet.

Q You were marketing here a posting terminal and market maker system that included $80,000 a month for sales staff?

A Well, the fact—

Q Go ahead.

A No, go ahead.

Q Was that the staff to handle the goods and inspect them I and deal with the goods that you were going to post on the terminal, post on the system?

A No. That's for the small store owner. The small store owner ran the posting terminal.

Q And so the small store owner—your system was the small system owner would pay $80,000 a month to have people going out and have to sell things?

A No. The business was—I think this is the Fleanet business plan. Fleanet was going to go sell the service to small business owners and say we have this value added proposition that you can log into our computer go-between and it will help you reach markets you couldn't otherwise reach. [520] And the pitch went further, that we can offer this to you on an inclusive basis, why you want to sign up, pay the fees.

MR. RANDALL: Let's go to page 3, paragraph 5, under operating procedures. It's under franchise relationship between market maker.

BY MR. RANDALL:

Q I'd like to direct your attention specifically to the section that says the franchise relationship between the market maker and the small business. Do you see that?

A Where? Halfway down?

Q It's a heading. It says franchise relationship between the market maker and the small business.

A Yes.

Q About three lines down over to the right-hand side, I'd like to direct your attention to this sentence. It says, Operating procedures and rules governing the posting and de-posting of goods must be developed alongside the posting terminal software. The fee arrangement, loss of franchise enforcement provisions, legal relationship between the parties, and alloca-

tion of risk must be incorporated in the franchise agreement. Do you see that?

A Yes.

Q And that was all true, correct, when you wrote that?

A Yeah. I thought that we could go brand a small business, like put a sticker in the window, like we accept American [521] Express that said Fleanet, and that—because the computer go-between is processing the transactions, handling the money, that we needed a way to have an understanding with the store what happens if they get a bad credit card, who is going to pay for that.

Q I'm not talking about stickers on the windows. I'm talking about your statement here that says, for instance, Business methods such as approved consignment contract forms, bailment agreements, risk disclosure forms, waivers, copyright permission and the like must be provided to the franchisees to assure orderly and legal transactions. Do you see that?

A Yes.

Q That was true when you made it, right, that statement?

A Well, it was true that we wanted to provide a package to the small stores and say, look, this is a complete form book. Somebody walks in, you can have them sign up. These are the terms, this is your brand. We wanted to provide the value added proposition to the small store, yeah. So that was true in the business plan.

Q And those procedures had to be developed at that time, correct?

A Yeah. I wasn't much of a businessman. But that was the business idea, that we could go to these small stores and give them a value added proposition.

Q But those procedures in that paragraph, they had to be [522] developed, right? They must be developed?

A Does it say must be developed?

Q It says, Operating procedures and rules governing the posting and de-posting of goods must be developed.

A Yeah. Rules to give the small business owner, to explain that that electronic market is different. It's not just an advertising site.

Q Right. And your patent application didn't explain those rules and procedures, did it?

A Yes, it did.

Q Then why did you still have to develop them?

A Well, the patent application is written with an audience of one of ordinary skill in the art, to presume to have certain knowledge, like modifying the data record. But that had ramifications to explain to the lay person such as a small business owner, to explain it in a way that it made sense, that we were giving a value added proposition. This is not advertising in the newspaper. It was different. It was new, it was unique. It was something worth paying for. Those were the things we wanted to put together.

Q There was no way for, for instance, a computer programmer without any legal training to come up with those rules and procedures, right?

A Why not?

Q Well, you hadn't included them in your patent, correct?

* * * *

[532] PROCEEDINGS

(Proceedings resumed after luncheon recess as follows:)

(The jury entered the courtroom.)

THE COURT: Hope everyone had a good lunch. Mr. Randall?

MR. RANDALL: Thank Your Honor.

CROSS-EXAMINATION (Cont'd.)

BY MR. RANDALL:

Q. Mr. Woolston, during the 1996 and 1997 time frame, you made a number of efforts to contact or to find business

partners to help with you this consignment node system, correct?

A. I believe we were trying to raise capital then, yes, or find partners.

Q. You contacted a company in 1996 called KPCB Java; is that right?

A. That was actually a fund sun by Kleiner, Perkins & Byers.

Q. All right. You contacted them, gave them a copy of your business plan to see if they would be interested in investing, right?

A. I think we sent them the patent application and the business plan, yes. We sent that to California.

Q. And they didn't invest any money in MercExchange, [533] right?

A. No.

Q. They didn't partner with MercExchange, correct?

A. No.

Q. By August of 1997 you had left Howrey & Simon, the law firm, and went to another firm in Washington, D.C., Fish & Richardson; is that right?

A. Yes, I believe I was at Fish & Richardson in 1997.

Q. Why didn't you instead just write the code to start your business?

A. Capital. Lack of capital.

Q. Did you know at the time, in August of '97, that eBay was on the World Wide Web conducting on-line auctions?

A. I don't know if I knew by then or not. I think it was around that time frame I became aware of eBay.

Q. Now, you filed your first application in April of '95, correct?

A. No. I take that back. I, I don't think I was aware of eBay in '97.

I'm sorry, go ahead.

Q. All right. You were up to speed and one of extraordinary skill in the art at the time you filed your application in April of 95, right?

A. I thought in 95 I was one of extraordinary skill in the art, yes.

[534] Q. And you continued, through 1996 and 1997, to keep up with the state of the art as it related to your Inventions, did you not?

A. I don't know if that's necessarily true or not.

Q. You don't know?

A. No. Technology has a shelf life. I was getting further out of engineering school and I wasn't in a programming job.

Q. But you continued to file patent applications, right?

A. We filed additional patent applications in '99, 1999.

Q. All right. Did you keep up with the state of the art after filing your application in '95?

A. I, I don't think so. I didn't actively go out -I didn't have a programming job.

Q. And you never saw eBay or heard of eBay on the World Wide Web even as late as August of '97?

A. Maybe. I just don't have a specific recollection.

Q. In 1997 you continued to look for investors and partners who would help you with this consignment node system, correct?

A. Yes.

Q. You contacted a company in June of '97 called Wavelynx, L.L.C., correct?

[535] A. He was a—yes. I contacted a guy and met with him over in Old Town, Alexandria.

Q. And that company did not partner with you, right?

A. No They were a small company. They didn't have capital either. No, we did not partner with them.

Q. They didn't have any money?

A. No.

Q. Why were you contacting them about your invention?

A. Well, they, they had a newspaper article, I think it was

in the Washington Post, about some activities they were doing, so I contacted them, tried to get them interested in working on MercExchange.

Q. And nothing came of that contact, right?

A. No.

Q. You contacted Adams-Eliot, L.L.C. in August of '97, correct?

A. Yes.

Q. And they didn't partner with you, right?

A. Well, Adams-Eliot, L.L.C. is a friend of mine's company. It's a one man company. I sent him the business plan and a cover letter to see if I could get some interest, but I never got a partner out of it, no.

Q. You never got a partner and didn't develop any interest in your system, right, with respect to that contact?

[536] A. Bill batch was very interested in helping, but we didn't have any capital. We didn't find any capital.

Q. You contacted, in October '97, J.G. Fogg & Company, Inc. right?

A. I think so.

Q. Gave them your business plan, right?

A. We might have.

Q. Okay. But you didn't get any investment from them or any partnering deal from them either, did you?

A. No. I think they were in Massachusetts.

Q. In November of '97 you wrote Parthenon Group, gave them your business plan—

A. Right.

Q. —right?

A. Yes.

Q. And you didn't partner with him, and you didn't get any money from them either, did you?

A. No. They didn't invest.

Q. In March of—strike that.

In November of '97 you wrote George Mason University and gave them your business plan, right?

A. Yes.

Q. Nothing came of that, either, right?

A. I wouldn't say nothing. I got in touch with the Redmon Group through George Mason University and I met with, [537] I think it was Mr. Redmon. He had a small company over in Old Town Alexandria.

Q. They didn't Invest and they didn't partner with you, correct?

A. They were very interested in doing it, but they didn't have any capital either. So they did not. We did not, we weren't able to pursue it together.

Q. In June of '98 you wrote the Washington Antiques Center and gave them your business plan, right?

A. Yes.

Q. And they weren't interested in giving you money or partnering with you either, were they?

A. No.

Q. Throughout this time frame, through 1996 through 199, you didn't write any software code to implement your consignment node inventions, did you?

A. Probably correct.

Q. You made no effort whatsoever to try to build your system, did you, during that time period?

A. No. We made a lot of effort to find venture capital in Virginia, to find people willing to partner here in Virginia.

Q. And no one did, right?

A. No. We were unsuccessful.

Q. And that wasn't because eBay was out there right? [538] Because you hadn't even heard of eBay, correct?

A. I don't know if I had heard of eBay or not.

Q. But in all these meetings that you had with all these people, no one ever mentioned eBay, right?

A. Probably not. I don't think any of us had ever heard of eBay.

Q. All right. So your failure to develop more money or partners during this time period, from 1996 to 1998 had nothing to do with eBay, right?

A. I don't know. I can't ascribe the motives of the California venture firms we solicited, the Massachusetts venture firms. Maybe they knew something I didn't.

Q. By the end of 1998 you had moved to a third law firm, the Hunton & Williams law firm, correct?

A. I think that's about the time frame.

Q. And you still hadn't tried to at least build your system in terms of writing code, right?

A. I personally hadn't written code. We were still, I believe, seeking partners.

Q. Right. But by the end of 1998, neither you nor anyone on your behalf had begun or even attempted to write code for your system, right?

A. No. I said I began writing code in '94. I had a RAD tool, I did a GUI for it, but I stopped. I didn't have time to do it in '94—or I'm sorry, '95. So the answer to [539] your question is I did a little bit in '95, but I wasn't able to find other technical partners.

Q. All right. So from 1995 through the end of 1998, either neither you nor anyone on your behalf attempted to write code to implement your inventions, right?

A. I don't know if I was still trying to do it in late '95. Probably not.

Q. By the end of 1998 you heard of PriceLine.com, correct?

A. Yes. By the end of '98.

Q. And that was the name-your-own-price system right?

A. Yes.

Q. You would log on, name your own price, and maybe some airline would accept it, right? That's basically how it worked?

A. It's a, it's a little more technical than that.

Q. Okay. You believe that you invented the name-your-own-price idea, don't you, sir?

A. No.

Q. You believed that the name-your-own-price system implemented by Priceline was described in your patent, don't you?

A. It interfered—they had a patent to issue, the '207 patent, that interfered with one of the, one of the modes in our application, yes, I believe that.

[540] Q. And you stated that when you read that Price-Line had a patent, right?

A. Yes.

Q. And it issued, right?

A. Yes.

Q. Got through all the procedures at the Patent Office and issued, right?

A. Yes.

Q. And you stated that when you read that patent, the PriceLine patent, you were shocked that this examiner had not declared an interference between your patent and their patent, correct?

A. Probably.

Q. Well, that's what you wrote, right?

A. I don't know.

Q. And an interference between your patent and the PriceLine patent, what does that mean, sir?

A. Because we were earlier in time, the Patent Office issued a patent to PriceLine that was filed 16 months after we filed ours.

And interference, because we were trying to commercialize our invention, there was the potential that one of the nodes of our invention could have infringed the PriceLine patent. And interference is a procedure at the Patent Office where you can submit documents, make your [541] petition to the Patent Office and say these two patents are tangled, we need to award priority and untangle them.

Q. So you thought the Patent Office, during the prosecution of the PriceLine patent, should have discovered your application as prior art and declared this interference, right?

A. Our patent applications weren't prior art at the time to PriceLine. The European patent application probably was prior art to PriceLine. I'm not an expert on interference practice.

Q. All right. But you were shocked, you didn't believe the Patent Office had done, had done their job properly with respect to these two applications that were pending at the same time in the Patent Office, right?

A. It's not really a matter of doing their job correctly, it's just a procedure that's set up at the Patent Office you can provoke, you can invoke, and have the patents untangled.

Q. The after some further—strike that.

You contacted PriceLine and asked them to partner with you, didn't you?

A. Yes.

Q. And you stated after some further investigation, you contacted PriceLine to propose that MercExchange and PriceLine work together to fully develop the technology, [542] right?

A. Yes.

Q. And after you explained your patent and your inventions to PriceLine, they offered you—and this is your words—they offered you a peppercorn for the entire intellectual property portfolio for MercExchange, right?

A. Yes. It's been my impression that big companies don't like to deal with the small inventors.

Q. That's not my question. My question was that after—

A. That's correct. That's correct. It was a very low offer.

Q. What was it?

A. I don't remember.

Q. You can't remember what the offer was?

A. It was very low.

Q. That was the first offer you'd ever received for your

intellectual property rights, and you can't remember what it was?

A. No.

Q. That was the first offer you had ever received for your intellectual property rights, correct?

A. Probably.

Q. And PriceLine had heard your explanation of all of your intellectual property rights and had done their [543] homework at the time, correct?

A. No, I don't know that.

Q. Okay. The interference that you filed in 1998, you asked the Patent Office to give you the PriceLine patent claims, right?

A. It's more complicated than that. I'm not an interference expert. It has to do with setting up account. It's like a phantom patent claim that covers the two and then they toy to untangle them.

Q. But you thought that you, based on your application, rightfully owned the PriceLine patent claims, correct?

A. No, that's not exactly how it—that might be an inartful way of putting that. I might have even said that at one. But the problem was that we were still hopeful that we could commercialize the invention, and there was a patent out there, PriceLine patent that we could have been infringing. So to protect our rights, we had to file this paperwork with the Patent Office to say please untangle these two patents.

Q. You complained to the national media that PriceLine was ripping off our intellectual property and that you, not the PriceLine entrepreneur, Walker, had invented the name-your-own-price idea, didn't you?

A. I don't know if I said that or not.

[544] Q. You did talk to the national media about this PriceLine interference, correct?

A. Yes.

Q. And at the time when you received this coverage, you also told the Wall Street Journal that you did not believe on-

line auction sites like the popular eBay, Inc., San Jose, California infringed on your patented technology, correct?

A. At the time we only had the '265 patent, and yeah, at the time I don't believe eBay did infringe. I still believe that, at the time.

Q. And you told that to the Wall Street Journal and they reported it and put it in their newspaper, didn't they?

A. No, I don't believe I exactly said that.

Q. What did you tell the Wall Street Journal about eBay not infringing on your patented technology?

A. I don't really remember. I remember the quote coming out in the paper and I said that was awful garbled. I can't believe that was what I said to the reporter.

Q. And the quote was "Mr. Woolston said he didn't believe on-line auction sites like the popular eBay, Inc., San Jose, California, Infringed on his patented technology."

That was the quote, right?

A. No, I don't think so.

Q. Okay.

[545] A. Can I see the article?

MR. RANDALL: Sure.

Can I put it up, Your Honor?

THE COURT: Hm-hmm.

MR. STILLMAN: Can we hand it to him first? Can we hand it to him before we start showing it to the jury? Because this was a document that was excluded in the pretrial order.

THE COURT: Well, it may have been excluded, but I think at this point it's based on his answer. Certainly he can look at it.

MR. STILLMAN: Yeah, that's what I'm saying. Can he look at it before we show it?

THE COURT: Sure.

MR. RANDALL: Okay. We can turn that screen off and his screen can go on and your screen can go on, Your Honor.

THE COURT: That's fine.

BY MR. RANDALL:

Q. Do you see that? I believe it's about in the middle of your screen, Mr. Woolston.

A. Yes. The quote is "Mr. Woolston said he didn't believe on-line auction sites like the popular eBay, Inc, San Jose, California, infringed on his patents technologically."

[546] Q. All right. That was reported in the Wall Street Journal, correct?

A. Yes, it was.

Q. And that was dated January 13, 1999, correct?

A. If I can see the date I'll—

MR. RANDALL: Can I put this on the screen now, Your Honor?

THE COURT: Just that portion of it.

BY MR. RANDALL:

Q. See the date of the Wall Street Journal dated January 13, 1999 Mr. Woolston?

A. Yes.

Q. Okay. You did speak to the Wall Street Journal on ox about that date, correct?

A. Before that date, yes.

Q. You did speak to them about whether or not eBay infringed your patent technologically, correct?

A. I spoke to the reporter who had the byline, yes.

Q. And you talked to them, you talked to the reporter about whether or not eBay infringed your patent technologically, correct?

A. No, I don't think I said that. That's where the quote came up muddled.

Q. Did you say anything to that reporter that you believed would indicate that eBay did not infringe your '265 [547] patent at that time?

A. Yes. I believe that he asked me, well, this looked exactly like eBay. Does eBay infringe? And we had the '265 patent and I said, you know, I don't think they infringe the '265 technically because they don't have a transaction processor. Integrated into the system.

Q. And you believe that today? That eBay did not infringe your '265 patent in 1999, correct?

A. Yes. I believe they do not Infringe the '265 patent in January 1999. I could be wrong. That's what I believe.

Q. You referenced a company called Aden in your direct examination, right?

A. Yes, sir.

Q. Aden chief executive officer Mike Luther called you within a week after this Wall Street Journal article came out regarding PriceLine, right?

A. Yes, sir.

Q. And he told you all about the Aden Enterprise company, right?

A. He told me about Aden Enterprises and himself.

Q. He told you—

A. Yes.

Q. Did he tell you that Aden had never made a profit as of that date?

[548] A. I believe so.

Q. Did he tell you that Aden had a significant debt and litigation in January of 1999?

A. Yes. He explained that to me, that there was a SmartPay credit card processing company that was in there that was undergoing litigation and liquidation in Miami, I believe. That was the litigation—

Q. Okay. Just yes or no.

Did he tell, did he inform you in any way in January of 1999 that Aden had significant debt and litigation?

A. I don't know if it's January or not, but yes, at some point he told me.

Q. Well, you entered into an agreement with Aden Enterprises and MercExchange on January 19, 1999, didn't you?

A. If that's the date you have on an agreement then that's probably the date, yes.

Q. You don't know?

A. I don't know the exact dates, no, sir.

Q. That was the first patent license agreement that you ever entered into, wasn't it sir?

A. Well, the patents had been assigned to MercExchange. That's technically the first one. This is the first licensing opportunity we had, yes.

[549] Q. This is the first company that ever agreed to any license arrangement with you for your intellectual property rights, right?

A. Well, what we found was that after the patent issued in December of '98, it was easier to get licenses, and yes, we had our first license. I believe it was January 19, I'm just not 100 percent positive on dates, Mr. Randall.

Q. Have you read the January—you understand in January 1999 you had a license agreement with Aden Enterprises, right?

A. I won't refute you if you have one dated January 19, 1999. I just don't have the dates from memory.

MR. RANDALL: Do you want to pull up Exhibit 283?

BY MR. RANDALL:

Q. Is that your signature on the last page of this exhibit, sir?

A. Yes, it is.

Q. All right.

Looking at the front page of this agreement, do you recognize this now, sir?

A. This looks like a letter agreement. The first agreement.

Q. Dated January 19, '99, right?

A. Yes.

[550] Q. Go to Paragraph four. You signed this agreement on or about January 19 of 1999, correct?

A. Yes, I believe so.

Q. Are you guessing, or did you do it?

A. Well, the document—you asked me if that's the date by my signature, yes. On or about January 19th, 1999.

Q. Sir, I don't want you to guess up here. This is a really important case. I want you to tell me the best recollection that you have. Do you remember entering into an agreement with Aden Enterprises in January of 1999?

A. Yes.

Q. Okay. And this is it, correct?

A. I believe so.

Q. All right. It states here in Paragraph 4, "The company has significant debt and litigation, although I have guaranteed it in entirety and indemnified the company for all litigation."

Do you see that?

A. Yes.

Q. So you were put on notice at the time that you entered into this agreement that Aden was laboring under significant debt and litigation, correct?

A. Yes.

Q. And pursuant to this agreement, you were going to provide an ownership interest in MercExchange to Aden, and [551] Aden was going to provide some stock to you, correct?

A. I need to read it. I'm not sure if they were taking an ownership interest in MercExchange in this agreement or not.

Q. Let me direct your attention to another portion of this Paragraph 4.

It states that "Aden is a publicly traded company on the OTC bulletin board.

That means the over-the-counter bulletin board, right?

A. I believe so, yes.

Q. Okay. "It is not in compliance for reporting purposes at the present time."

Do you see that?

A. Yes.

Q. That means it's not in compliance with the law, right?

A. I'm not a securities attorney, so I don't really have a legal opinion on it.

MR. STILLMAN: Excuse me. That's an improper question. That's not what it means at all, and Mr. Randall knows that. And Mr. Randall—

THE COURT: He's answered the question.

MR. STILLMAN: Okay.

THE COURT: Next?

[552] BY MR. RANDALL:

Q. Mr. Woolston, what did you do, if anything, to investigate whether they were in compliance with the corporate laws governing companies like Aden?

A. I did my diligence on Mr. Luther and Mr. Dan Koch from Omaha as individuals. They had made a tremendous amount of money from a company called HomeStore.com—

Q. I'm just asking you about what you did to determine if they were in compliance with the law.

A. I'm telling you what I did as my diligence. Can I finish my answer?

Q. Sure.

A. Mr. Koch and Mr. Luther had made a tremendous amount of money, at least on paper, from a company called HomeStore.com, and they had personally indemnified Aden Enterprises, and they said they were going to make it compliant with reporting requirements. That's the extent of my diligence.

Q. They said they were going to make it compliant? That's what it was?

A. Yes.

Q. And what efforts if anything—strike that. What did mercExchange get out of this license agreement?

A. Can I take a moment to look at it?

[553] Q. Sure. Direct your attention to Paragraph 4 specifically.

A. I think it's the next page.

Q. Okay.

A. Next page, please.

Q. The license under 6.1, the MercExchange technology means the '265 patent and all related applications, correct?

A. Yes.

Q. And under Paragraph 7, you agreed to a patent license to Liberty Travel, correct?

A. In the travel services field of use.

Q. Right.

A. Yes.

Q. Okay. And in Paragraph 9, what you, MercExchange, received in return for that license was four million shares of restricted stock. Do you see that?

A. Yes.

Q. What did you do, if anything, to determine what the value of that stock was at the time you licensed your patented technology to Aden?

A. Looked at the price that it was trading at.

Q. Did you ask Mr. Luther how much money or how much revenue Aden Enterprises was making at the time?

A. I don't remember now.

Q. Did you ask Mx. Luther what the expenses of Aden [554] Enterprises were in 1999?

A. No.

Q. Did you do any due diligence whatsoever to determine how much expenses Aden Enterprises had in 1999 ant how much income they had in 1999?

A. No, other than talking to Mr. Luther and Mr. Koch.

Q. Well, in fact, sir, you knew, did you not, that at the time you signed this license agreement, that at that time you knew that Aden Enterprises had $98,000 in income for 1999 and they had $338,000 in expenses in 1999. You knew that, right?

A. No.

Q. Did you read Mr. Luther's deposition testimony, sir?

A. I think I read a little bit of it.

Q. Did you read his testimony about the expenses and income of Aden Enterprises in 1999?

A. No.

Q. You didn't read that?

A. No.

Q. And you never found out, right, by the time you signed this license agreement, right?

A. I don't, I don't believe I knew, no.

Q. And what if anything did you do to determine whether those shares of stock that you might receive were [555] actually legitimate and legally issued?

A. Nothing. Mr. Luther had securities attorneys.

Q. You never received any royalties for this patent license agreement, correct?

A. I don't know. I need to read the rest of it.

Q. Well, let me ask you this: Did Aden Enterprises ever develop a product that practiced your inventions, such invention, such that you had to pay them—such that they had to pay you royalties?

A. They had paid some license issue fees, but we were never paid, I don't believe we were ever paid royalties per se. We were paid license issue fees, which I think they were counted as royalties.

Q. At this time, January 1999, you were still working at Hunton & Williams, correct?

A. Yes, I believe so.

Q. And Aden was a Hunton & Williams client, right?

A. Not at this time, no.
Q. Are you sure about that, sir?
A. Very sure.

I think this agreement actually made them a client. It made them a partner with MercExchange.

Q. You were doing work for Aden Enterprises while you were at Hunton & Williams, right?
A. No. [556] Well, yes. Yes, as an attorney.
Q. Well, you stated in your deposition, I asked you the question, "Were you doing work for Aden Enterprises while you were at Huston Williams?

"Answer: Yes. I think. I think you could say that. Yeah.

"You were?

"I think so, yeah.

"You were their attorney?

"Answer: I believe so, yes."

Does that refresh your recollection?

A. Yes.
Q. Okay. So while you were at Hunton F. Williams, you were representing Aden Enterprises, right?
A. Yes.
Q. And you entered into this agreement with Aden Enterprises on behalf of MercExchange, right?
A. That was before they were a client.
Q. After you entered this January 1999 agreement and while you were still at Hunton Williams, you represented Aden on a whole host of issues, right?
A. I don't know about a whole host. It was a—
Q. How about a whole raft of stuff?
A. Maybe I said that in the deposition.
Q. Okay. And while you were an attorney at Hunton [557] Williams, you represented MercExchange also, right?

A. Yes. But this agreement allowed the company to go hire its own attorneys.

Q. So while you were an attorney at Hunton & Williams, you represented both MercExchange and Aden, right?

A. I believe so, yes.

Q. In April of 1999 you entered into a new agreement with Aden Enterprises, right?

A. Probably.

Q. And you were involved in these negotiations, right, sir?

A. Probably. Definitely. If that was an agreement, I was involved with it.

Q. And at the time of this April 1999 agreement, you owned a significant portion of MercExchange, right?

A. Yes.

Q. And you also owned a significant portion of Aden Enterprises, right?

A. I don't know. Could be.

Q. Could be.

You were also Aden's lawyer at the time too, correct?

A. Yeah. I had a relationship with Aden. I guess you would consider I was its lawyer, its advisor.

Q. Right. In April of 1999 you were working at [558] Hunton Williams, you were representing Aden and you owned Aden and you owned MercExchange, right?

A. Yeah. I just have a hard time separating out giving business advice to Aden versus putting them in touch with or giving them legal advice. It was all mixed together.

Q. Yeah. I have the same issue.

So then in April of 1999 when you signed this agreement, you were negotiating for yourself against your own client, Aden Enterprises, but you also owned some of that client in terms of stock, right?

A. Which April agreement are you talking about?

Q. The April 1999 agreement.

A. Can you show it to me?

Q. Is that going to assist you in answering my question?

A. Yes.

Q. I'll move on.

You left Hunton & Williams and you joined Aden Enterprises in August 1999, didn't you?

A. Yes.

Q. In fact, you signed an agreement, an employment agreement with Aden Enterprises in August of 1999, didn't you?

A. Yes. Probably.

[559] Q. Probably?

A. I just don't have all these dates fixed in my head. But yeah, that's, that time frame sounds right.

Q. Would you like me to refresh your recollection with your videotape testimony?

A. I don't think you were putting the document in front of me in my deposition either, so I don't think it's going to help me. If you have the employment agreement, I'm happen to tell you the date on the agreement.

MR. STILLMAN: Excuse me. I've tried not to object, but I don't see what the relevancy of all this is to a patent infringement suit. So I object on the basis of relevancy.

MR. RANDALL: He introduced a series of Aden Enterprises license agreements claiming that those represent a damages figure. They are seeking an enormous—

THE COURT: Okay. Wait a minute. Just a second.

MR. STILLMAN: If he's trying to establish that there was a related party relationship between Mr. Woolston and Aden at the time the license agreement was entered into, I'll stipulate to that. There was.

MR. RANDALL: Your Honor, I think the jury needs to hear the evidence. If he wants to withdraw those license agreements, he can withdraw the license agreements.

THE COURT: Why don't you go into the jury room [560] for a second, please?

(Jury left the courtroom.)

THE COURT: I tried my very best not to have to do that. Now let's get on with it. What is the issue? Why is it relevant?

MR. RANDALL: The issue is, Your Honor, he is testifying—they have put into evidence these license agreements claiming that they are arm's length transactions; that these are fully negotiated arm's length transactions between MercExchange on one hand and Aden on another; between MercExchange on one hand and various Aden subsidiaries. They form the core of their damages case in this case. What they argue is that those license agreements between Aden and MercExchange, Leftbid and MercExchange and Cheapfares and MercExchange, a number of these license agreements, all support their reasonable royalty in this case as arm's length transactions between MercExchange and these other companies.

In fact, and we've argued throughout this case, that they're not arm's length transactions; that Mr. Woolnton was on both sides of the table. He had, he was an officer in both companies, he was an owner of both companies. These are nothing more than sham agreements intended to use later in litigation. In fact, there is an agreement in place for them to sue eBay in the 1999 time [561] frame as well. So at a time when they had their targets fixed on eBay, two companies with an ownership interest in the lawsuit, with an ownership interest in each other, are cutting these license agreements back and forth, numerous ones, and their damages experts are relying on them.

THE COURT: Okay.

MR. STILLMAN: Mr. Randall is right in part and wrong in part. They are clearly not—

THE COURT: Does that mean the firm has—

MR. STILLMAN:—arm's length transactions.

THE COURT:—reversed employees?

MR. STILLMAN: I agree with him. They are not, and I've never contented that they are arm's length transactions. They are clearly related parties. As a matter of fact, I brought that out in direct, that these were related party transactions because Mr. Woolston was an officer both in Aden and in MercExchange at the time. And so I've never contented otherwise, and I would stipulate to that fact and we can move on and get things going to the things that are relevant.

It's also wrong to say that we're offering this license agreement to prove a reasonable royalty. It is relevant to the consideration of what a reasonable royalty is, because under the Georgia Pacific factors, anyone who establishes one has to look at all of the license [562] agreements—

THE COURT: Right.

MR. STILLMAN:—the company has. But our expert will tell you, yeah, I looked at it and I saw that it was a related party transaction. And so that obviously has an effect on it. And he will say that. But this is going on much too long. It's not relevant.

MR. RANDALL: Your Honor, we brought a motion in limine on this and we wanted to exclude it for this very reason: that it is not an arm's length transaction, it doesn't mean anything, and yet they resisted that, number one. But number two, their damages experts are relying on this, and I believe their damages experts have said that they believe that these were arm's length transactions. I can find documents

and pleadings and expert reports that will indicate that they argued that these were arm's length transactions. That Mr. Luther—

THE COURT: "They" meaning who?

MR. RANDALL: MercExchange.

THE COURT: All right.

MR. RANDALL: I'm not going to go into this much further, but I think the jury needs to hear what type of relationship existed between these companies. Particularly the ones with respect to the license fees.

THE COURT: How many companies are you talking [563] about?

MR. RANDALL: What's that?

THE COURT: How many companies are we talking about?

MR. RANDALL: It's Aden and it's LeftBid. I think there's one other. But I don't anticipate much more on this, but I've got to walk through the agreements that they are relying on.

And by the way, this agreement in January of 1999 between Aden and MercExchange was the only agreement that was entered into between Mr. Woolston and MercExchange and Aden where he was not at that time a co-owner, co-officer of both companies. In the April agreement he was, the October agreement he was.

THE COURT: Anything else?

MR. STILLMAN: No, Your Honor, the only thing I would say is if we have continued—contended that this is anything other than a related party transaction, I'm not aware of it. Because I would never have agreed to do that. It is clearly a related party transaction. Related party transactions occur in public corporations all the time. They are footnoted in the financial instruments.

I'll stipulate, I'd offer that stipulation today, that it is a related party transaction.

THE COURT: Objection's overruled.

[564] MR. RANDALL: Thank you, Your Honor.

(Jury returned to the courtroom.)

THE COURT: Quickly, Mr. Randall.

BY MR. RANDALL:

Q. Mr. Woolston, when you joined Aden Enterprises as an officer of that company, did you care which company you worked for, whether it was Aden or one of its subsidiaries?

A. No, not particularly.

Q. All right. And you joined Aden Enterprises in August of 1999 as their chief technology officer and as their general counsel, correct?

A. Yes.

Q. And you entered into a series of license agreements with Aden Enterprises while you were the chief technology officer of Aden, and you were also the general counsel of Aden and a co-owner of Aden and an owner of MercEx change?

A. Right. Yes.

Q. And those are these agreements that I understand that you're relying on, in part, for your damages theory in this case, correct?

A. No.

I don't understand that.

Q. Let me ask you something: Do you understand the term arm's length transaction?

[565] A. I believe so.

Q. And what's your understanding of that, sir?

A. It's like you and I, as total strangers, negotiate for the best bargain at arm's length. Each representing themselves.

Q. And these agreements between MercExchange and

Aden Enterprises, they were license agreements for your patents, right?

A. Yes.

Q. And because they were entered into while you were general counsel and chief technology officer and co-owner of Aden on one hand, and an owner of MercExchange on the other, they were not arm's length transactions, were they sir?

A. That's correct. They were related party transactions.

Q. And at that time you were serving as managing member of MercExchange, correct?

A. Yes.

Q. And you've always been the managing member of MercExchange, correct?

A. Yes.

Q. Which means that you're the CEO and president, right?

A. Yes.

Q. And you had a fiduciary duty do you not, to your [566] partners and your employees?

A. Yes.

Q. As an Aden officer, you were involved in the decision to form Aden subsidiary LeftBid, correct?

A. Yes.

Q. You formed LeftBid in October of '99, sight?

A. Yes.

Q. And your company, MercExchange, received a percentage of ownership of LeftBid, correct?

A. Yes.

Q. And you're LeftBid's chief technology officer, correct?

A. Yes.

Q. MercExchange and LeftBid entered into a patent license agreement in October of '99, correct?

A. Sounds right, yes.

Q. And at that time you were the general counsel and you were the chief technology officer and a co-owner of Aden, right?

A. I wasn't general counsel then, but I was still an officer, yes.

Q. Okay. You were—at the time you entered into this agreement between MercExchange and LeftBid, Leftbid was a subsidiary, or a child, if you will, of Aden Enterprises, right?

[567] A. Yes.

Q. And at the time MercExchange and LeftBid entered into this October '99 patent license agreement, you were an owner of MercExchange and the president and CEO of MercExchange on one hand, right?

A. Yes.

Q. And on the other hand you were the chief technology officer and co-owner of LeftBid?

A. Right. The agreement actually gave ownership to MercExchange. But yes, I was the CEO of LeftBid. It was a related party transaction.

Q. And you were also a co-owner and officer of LeftBid's parent, Aden, correct?

A. Yes.

Q. And part of that agreement with LeftBid was this nexus requirement, right?

A. Yes.

Q. And the nexus requirement between Aden—strike that.

The LeftBid and MercExchange license agreement required LeftBid to build and implement your inventions, correct?

A. No.

Q. What was your understanding—strike that. You understood the October 1999 LeftBid and [568] MercExchange agreement to require LeftBid to confer with

MercExchange to ensure—to assure a tight nexus between the commercial embodiments of the Internet markets and auctions with the claims of the pending and issued subject patents, correct?

A. Was that a clause in the agreement? Is that what you're asking?

Q. Yes.

A. Yes, but—

Q. Okay.

A. —it couldn't force LeftBid to do it.

Q. I'm not asking you about force. I'm asking you about whether the agreement you signed between MercExchange and LeftBid required LeftBid to assure that there was a tight nexus between the claims of your inventions and what LeftBid, the system LeftBid was trying to build?

A. The contract between LeftBid and MercExchange did have that requirement. It didn't require LeftBid to do it.

Q. Well, if they were going to build any system, they had to build it pursuant to your inventions, right?

A. No.

Q. Well, at least a tight nexus, right?

A. No.

Q. The clause that I'm referring to is requiring LeftBid—and I'm just going to ask you if this was the[569] agreement and we'll move on—was the agreement that LeftBid was required to assure a tight nexus between the commercial embodiments of the Internet markets and auctions with the claims of your pending and issued subject patents.

A. The patent license agreement between MercExchange and LeftBid did have that clause, but it couldn't force or require LeftBid to do that. LeftBid was its own company.

Q. But they had an agreement with MercExchange, right?

A. Yes. And they breached it.

Q. Okay. But the agreement required this tight nexus, right?

A. Yes.

Q. All right. That's what I'm talking about.

The agreement required LeftBid, if they were going to build a system, to build that around your inventions, right?

A. No.

Q. You sued—strike that.

When you were working as chief technology offices of LeftBid, you tried to make your '265 invention, correct?

A. No.

MR. RANDALL: Can you pull up Exhibit 51?

BY MR. RANDALL:

Q. Sir, I'm just going to ask you to look at the [570] front page of the license agreement between LeftBid and MercExchange. It's dated October of '99. I'm going to scroll down to try to find a signature page.

Is that your signature, sir?

A. Yes.

Q. Do you recognize that Exhibit 51 as the license agreement entered into between LeftBid and MercExchange?

A. Yes.

MR. RANDALL; Your Honor, I move Exhibit 51 into evidence.

THE COURT: Admitted.

(Defendant's Exhibit No. 51 received.)

BY MR. RANDALL:

Q. Exhibit 388 is a series of what appears to be your --

MR. RANDALL: Blow that up, please.

BY MR. RANDALL:

Q. A series of what appear to be your business cards, Mr. Woolston. One for LeftBid.com as the chief technology officer, one as Navlet for the chief executive officer and

president, one for MercExchange as the managing director, and one for Aden Enterprises as chief technology officer. Those are all your business cards, correct?

A. Yes.

MR. RANDALL: Your Honor, I move those into [571] evidence.

THE COURT: All right.

MR. RANDALL: Defense Exhibit 388.

(Defendant's Exhibit No. 388 received.)

BY MR. RANDALL:

Q. Mr. Woolston, between October '99 and April of 2000, you supervised the development of auction software for LeftBid, correct?

A. Yes. We developed software for LeftBid at Navlet.

Q. And you supervised dozens of engineers, including a team of engineers in Moscow, in their attempt to write software code for this auction system, correct?

A. For the LeftBid system, yes.

Q. And you managed that process, correct?

A. As well as I could, yes.

Q. You were the chief technology officer of LeftBid, right?

A. I thought I was, yes.

Q. How many engineers, software engineers did you have working for you, including these Russian engineers that were working?

A. None at, none at LeftBid.

Well, I take that back. There was a contractor up in New York that Mark Borghi was using. There was a contractor in Omaha, and there was, there were the four [572] Russians I believe that eventually got put in the LeftBid project, and I had at least three or four engineers in Alexandria working on it.

Q. Okay. And they were trying to develop this auction system for Leftbid that would have a tight nexus or tight relationship to your inventions, correct?

A. No.

Q. Did you make any attempt whatsoever as the chief technology officer of Leftbid to comply with this nexus requirement in the agreement between LeftBid and Merc-Exchange?

A. No. LeftBid had its own business driver. It wasn't the '265 system.

Q. That wasn't my question. My question was did you, as chief technology officer at LeftBid, make any attempts whatsoever to comply with this requirement that LeftBid was under, to develop a system that had a tight nexus or relationship with your inventions?

A. No.

Q. You made no effort?

A. Well, I think I tried to steer it in that direction, but I, there were other people running LeftBid and they didn't want to do it. That way.

Q. And when did you first understand that that wasn't happening?

[573] A. Probably soon after LeftBid got going. Mark Borghi and Mike Luther struck upon this idea that the system was going to broadcast like on television but on the Internet, a video picture—

Q. I'm just asking when—

A. —of the person.

Q. Just, when did you come to that conclusion?

A. Probably within—well, probably within, probably within 10, 8 weeks of its formulation. Mr. Borghi went out and we were going to this live bidding system. LeftBid was going to be this live bidding system.

Q. And what time frame is that?

A. I think about eight weeks after its formation.

Q. When I put up your business cards, one of the businesses was Navlet. Do you recall that?

A. Yes.

Q. And your title at Navlet was what?

A. I think I was president and CEO.

Q. President and CEO of Navlet. And that was also a company that was formed as a subsidiary of Aden; is that right?

A. Yes.

Q. And when it was formed you were also a co-owner of Aden and an officer of Aden, and a co-owner of the other subsidiary, LeftBid, and an officer of LeftBid, correct?

[574] A. I—it was a related party transaction. I don't know if your timing's exactly right. But I was an officer of both companies, MercExchange and Aden, when it was formed.

Q. And an officer and owner in both companies, right?

A. Yeah. The MercExchange—I owned stock in Aden through MercExchange.

Q. And in LeftBid and in Navlet, right?

A. Yes.

Q. So you were an officer and owner of all these companies, right?

A. Yes.

Q. Okay. And Navlet pitched in this effort to develop this on-line auction system as well, correct?

A. Yes.

You're talking about the LeftBid system?

Q. Yes.

A. Yes.

Q. Whatever system it was. You were all working together on this, weren't you?

A. We had three projects going on at Navlet. Three.

Q. Did you spend any time or any effort whatsoever at Aden or at LeftBid or at Navlet trying to build your inventions?

A. Navlet had, Navlet's away to navigate the [575] Internet, it's not in this lawsuit, it's the subject of four other patent applications.

Q. That's not—

A. The Navlet system has aspects of the '176 patent at its base. So yes, we, the Navlet system had aspects of the '176.

Q. At the time—you entered, on behalf of MercExchange, a license agreement with Navlet, right?

A. Yes. It was an agreement between Navlet and MercExchange.

Q. And at the time you entered into that agreement, you were a co-owner and a co—and an officer of both MercExchange and Navlet, right?

A. I think the agreement gave MercExchange an ownership in Navlet, but it was a related party transaction, Yes.

Q. You owned part of—you owned part of Navlet as soon as it was formed because you owned part of its parent company, Aden, right?

A. Yes.

Q. All right. These engineers that worked for you in Russia, they worked long hours, didn't they, on this project?

A. They said they did.

Q. They told you that they worked 14 hours a day, [576] seven days a week under your supervision, correct?

A. That's what they said, I believe.

Q. In fact, that's what they wrote you in an email on that subject, correct?

A. Quite possibly.

MR. RANDALL: Can we bring up Exhibit No. 156?

BY MR. RANDALL:

Q. Do you recognize Exhibit 156 as an email sent by Alexander Chernienko on or about January 18, 2000 to you?

A. Yes.

Q. About work that he was performing as a software engineer for LeftBid?

A. I think this is LeftBid, but they might have been working on the Navlet system too.

Q. All right.

MR. RANDALL: Your Honor, I'd move—

Q. And do you recognize this as an email that was sent from Alexander Chernienko to you on or about the 18th of January 2000, correct?

A. I believe so.

MR. RANDALL: Your Honor, I'd move 156 into evidence.

THE COURT: Admitted.

(Defendant's Exhibit No. 156 marked.)

BY MR. RANDALL:

[577] Q. Mr. Woolston, when LeftBid failed to implement your patented system, you—even with at least whatever assistance you provided—you sued them, correct?

MR. STILLMAN: Object to the form of the question. He said when LeftBid failed to implement the patented—

THE COURT: Rephrase the question.

MR. RANDALL: Sure.

BY MR. RANDALL:

Q. You sued LeftBid for what you considered to be this violation of this nexus requirement, correct?

A. We sued LeftBid, Navlet and Aden, I think, at the same time to try to separate the companies. One of the grounds we used to sue LeftBid—I don't know if we sued them. We terminated the license, because they had not, they violated the nexus clause and the royalty provisions.

Q. Well, in the complaint you stated that LeftBid has breached the LeftBid license by, inter alia, which means among other things, failing to pay royalties, failing to maintain reports of gross transactions and failing to comply with the nexus requirement of the LeftBid license, right?

A. Is that the letter I wrote to them terminating the license?

Q. I'm talking about the complaint, Paragraph 25.

A. I would need to see it.

MR. RANDALL: I'll accept a stipulation if—I [578] mean . . .

MR. STILLMAN: Sure. Anything.

THE COURT: Okay.

MR. RANDALL: Well, Your Honor—

BY MR. RANDALL:

Q. Your counsel has just stipulated that one of the reasons why you sued LeftBid, as stated in your complaint, was that they failed to satisfy this nexus requirement of the LeftBid license.

A. Right. They were not building the '265 or the '176 patented system, they were building their own, they were building a live bidding system that had nothing to do with the patent.

Q. And you believe they were required to build the '176 or the '265 system under that license agreement, right?

A. The license required them to do it, but you couldn't, you, I couldn't make LeftBid do it. LeftBid had its own business. It was doing its own niche. It was pursuing—

Q. In January of 2000 you entered into an agreement between MercExchange and Aden to jointly fund and share the proceeds of a lawsuit against eBay, correct?

A. What's the date?

Q. January 7, 2000.

A. That sounds about like the time we were going [579] through to enforce the patents, yes.

Q. Well, you actually formed an agreement. You entered into an agreement with—

A. Aden. Yes, I agree.

Q. Right?

A. Yes.

Q. In January of 2000, MescExchange and Aden entered into an agreement to share the costs and share the proceeds—

MR. STILLMAN: That's the third time he's asked that question.

THE COURT: It is. Just go on, Mr. Randall, please.

BY MR. RANDALL:

Q. Okay. Do you believe that eBay infringed at that time, in January of 2000?

A. The patent we were going to enforce against eBay in January 2000 had not yet issued. We had received an indication from the Patent Office it was going to issue. That was the '051 patent, that eventually issued as the '051 patent. Yes, that they infringed that patent that subsequently issued, and we believed eBay infringed it.

THE COURT: Next question?

MR. RANDALL: Okay.

BY MR. RANDALL:

[580] Q. That patent's not in this lawsuit, is it, sir?

A. No.

Q. After you left the Aden family of companies you tried to sell your patents, correct?

A. Yes.

Q. You tried to sell them to AuctionWatch, correct?

A. No.

Q. Did you ever send a letter to AuctionWatch asking them to negotiate some sort of an arrangement with you?

A. Yes, I think we did.

Q. And nothing happened to that, right? No agreement was reached?

A. No.

Q. Okay. And you also sent your patents to MySimon, correct?

A. No.

Q. AuctionWatch didn't buy your patent, did they?

A. No.

Q. They didn't license them?

A. No.

Q. You never sent a notice letter of any sort to MySimon?

A. No.

Q. How about DealTime, did you ever send any of your patent to DealTime?

[581] A. No.

Q. How about Bidder's Edge, did you ever send your patents to Bidder's Edge?

A. I called the principal of Bidder's Edge.

Q. And they didn't buy or license your patents either, correct?

A. They'd been put out of business by eBay.

Q. They didn't buy your license your patents, did they?

A. No.

Q. In the spring of 2000 when you were working at Navlet, you were working on a system that would crawl other web sites, correct?

A. It was a lot more complicated than that.

Q. Well, when I say—do you understand what I mean when I say "crawl a website"?

A. No.

Q. Okay. You were working on a system at Navlet that would allow it to enter another company's website and retrieve information, correct?

A. Among other things, yes.

Q. And you wanted at that time, in the spring of 2000, the Navlet system to be able to enter eBay's website and extract information, right?

A. Yes.

[582] Q. And you knew that eBay and Bidder's Edge were involved in a lawsuit, right?

A. Yes.

Q. You knew that eBay was trying to keep Bidder's Edge from entering eBay's website and extracting information, right?

A. Yes.

Q. And you thought what Bidder's Edge was doing was covered by your patent, your '176 patent, right?

A. Yes.

Q. Your lawyer, John Phillips, approached eBay and told eBay that perhaps it could use your patent against Bidder's Edge in the lawsuit, right?

A. I don't know if that was the approach. What I know is that Mr. Phillips was put into contact with

Mr. Monahan and Brett Healy—I believe he's sitting over there—about potentially buying the '176 patent, yes.

Q. You were sitting—you were there while Mr. Phillips was deposed, correct?

A. Yes.

Q. In this case?

A. Yes.

Q. You sat through the deposition and watched it, right?

A. Yes.

[583] Q. Take any notes?

A. No.

Q. Okay. Do you remember Mr. Phillips testifying that he initiated contact with eBay; specifically he contacted an ex-classmate Todd Cohen. Do you recall that testimony?

A. Yes. Todd Cohen and John Phillips went to law school together.

Q. All right. And do you recall Mr. Phillips testifying

that, in fact, he contacted Mr. Cohen and talked to him about the Bidder's Edge case?

A. No, but that makes sense.

Q. You don't recall that testimony?

A. No.

Q. Do you recall the testimony from Mr. Phillips that, that he contacted Mr. Cohen at eBay before there was any contact between eBay's lawyers and MercExchange?

A. Yes. That makes perfect sense, because the '176 patent had not issued at the time, so Mr. Monahan and Mr. Handler would have no reason to contact us unless they knew about it. So they knew about it from somewhere, and it hadn't issued yet. So they must have known about it from—

Q. All right. So the first contact between MercExchange and eBay relating in any way to your patents was Mr. Phillips contacting eBay and talking to Mr. Cohen, [584] his former classmate, about this Bidder's Edge case, right?

A. Yes. And then—

Q. But—

A. —the way I understood at the time, then we got contacted by eBay that said they were interested in buying the patents.

Q. I wasn't asking you about that, I was just asking about the initial contact.

But at the time Mr. Phillips contacted eBay, he didn't mention anything about any alleged infringement by eBay, right?

A. I don't know what he said.

Q. Well, you were sitting in there in his deposition?

A. I don't think he said he recalled what he said. I don't recall what he said in his deposition.

MR. RANDALL: Your Honor, may I refresh his recollection with respect to that issue? It's an important issue in this case, and I've just got a couple clips to play.

THE COURT: No, I don't think that's appropriate to show another person's deposition to refresh his deposition about what he said in the deposition.

MR. RANDALL: But he was there.

THE COURT: I know he was there, but . . .

MR. RANDALL: Okay.

[585] BY MR. RANDALL:

Q. Do you recall that yesterday you testified that, because eBay knew what your patent application numbers were, that somehow they must have done their homework?

A. Yes.

Q. Do you recall that?

A. Yes.

Q. And you suggested that perhaps they had found this foreign patent application of yours; is that right?

A. They must have found the license agreement we had with Aden off of EDGAR, because they had our serial numbers. Our foreign application wouldn't have our patent application serial numbers.

Q. Well, you're a patent lawyer. You understand that you can get related patent application numbers from the Patent and Trademark Office, right?

A. No. I'm not an expert on Patent Office procedures, and I don't believe that's true.

Q. You don't, you don't know that you can contact the Patent and Trademark Office and go on their web site and find out what the related patent application numbers are? Nothing else, just the numbers?

A. No.

Q. And you didn't know that yesterday when you suggested that maybe we, that eBay found out about these [586] numbers through some other means, right?

A. Maybe they did.

THE COURT: Good time to take a break?

MR. RANDALL: Sure.

(Jury left the courtroom.)

THE COURT: How you doing, Mr. Randall? Are we going to finish?

MR. RANDALL: Probably not. But certainly the . majority of what I've got by today, and maybe just a short, short examination on Monday morning. But I'm . . .

THE COURT: Okay. It's your case.

MR. STILLMAN: I know this is a waste of time, but I've got a big problem. Mr. Randall called me, left a voice mail last night, and I'm not criticizing, because I understand these things are difficult to plan, but said that he thought he'd be finished by lunch or shortly after lunch, and we brought our expert witness in this afternoon who cannot be here on Monday. Is there any chance that we could put him on—he's a short witness—out of order?

MR. RANDALL: Your Honor, what I said—

Mr. Stillman asked me yesterday --

THE COURT: I can't hear you.

MR. RANDALL: I'm sorry.

Mr. Stillman asked me yesterday if I was going to take the full day today. And originally I said yes, I think

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[589] jurors about the Friday traffic. And Mr. Stillman lives in this area, as some of the other lawyers do, but Mr. Randall, you don't, and this is an extremely unusual situation today. So I told Mr. Johnson to tell them that—and I'll tell them when they come out here—we're going to break at 10 minutes to 5:00, because once five o'clock starts, especially

with this extra traffic they have today, it's going to be a real problem with them. So we're just going to have to break at 10 minutes to 5:00 today.

(Jury returned to the court room.)

THE COURT: Ladies, I'm aware of the traffic today, and we're going to break at 10 minutes to 5:00 today so hopefully you'll be able to miss some of the traffic anyway, because I'm afraid there are going to be some road blocks. At least that's what the paper seems to indicate.

So let's go ahead, Mr. Randall, and see if we can get finished this afternoon.

MR. RANDALL: Thank Your Honor.

BY MR. RANDALL:

Q. Mr. Woolston, you realized in May of 2000 that eBay obtained an injunction preventing this Bidder's Edge company from trespassing on its website, right?

A. I became aware of the injunction. I'm not sure if I was aware of it in May.

Q. And you read that case, the Bidder's Edge/eBay [590] case about preventing trespassing--an eBay's website, right?

A. Not that I recall, no:.

Q. Do you recall, in the Spring of 2000, that you wanted to do a deal with eBay where you would swap some patent rights for permission to enter eBay's site—

A. Yes.

Q. I'm sorry. Enter eBay's site—

A. Yes.

Q. —and extract information?

You wanted to make an offer—strike that. :. You wanted eBay to make an offer to you, though, before reviewing your patent files; is that right?

A. No. What we said was we would give you a presentation of the patents and then—actually I think that was

early in the, very early in the discussions. I said we wanted to take a look at the issue of patents and give us a range, like a real estate transaction, of what you guys are talking about, and then you can do your diligence, and if it doesn't pass your muster, then you have no. obligation to buy.

Q. You were aware, were you not, in May of 2000, that Mr. Kumamoto, on behalf of eBay, wrote to MercExchange asking for the power to inspect the MercExchange file histories and pending patent application, right?

A. Yes. EBay wanted to have access to our patent [591] files at the Patent Office.

Q. And the power to inspect, that would allow eBay to get these applications directly from the Patent Office, right?

A. Yes. We also offered to make them available to you.

Q. Well, I'm just talking about the power to inspect.

A. Yes. Power to inspect is power to get the patent files from the Patent Office, yes.

Q. You never agreed to allow eBay to have this power to inspect your application files at the Patent Office, correct?

A. That's correct.

Q. Instead, in May you responded to eBay suggesting that we should hurry up this process of looking at your—

A. Do you have the email? Maybe we can speed it up. I mean, I just don't remember the exact give-and-take of conversations.

Q. Let me see if this refreshes your recollection. MercExchange told eBay on May 24 of 2000, .In the interest of full disclosure and candor, we are talking with third parties about the patent portfolio and also contemplating relationships that capitalize the MercExchange into an operating company."

Do you recall making that communication to eBay?

[592] A. Yes, that sounds like an email I sent. I don't know the date, exactly.

MR. RANDALL: Can you-just pull up—turn that screen off, but just pull up the email. That's DX19.

BY MR. RANDALL:

Q. You can see from this-email, Mr. Woolston, from you to the representative of eBay, that it's dated May 24, 2000, correct?

A. Yes, that's the date.

Q. Okay. So you made that statement to eBay on May 24, 2000, correct?

A. I made to Andrew Kumamoto. Yes. EBay.

Q. There weren't any third parties that you were contemplating relationships with in talking to at that time, were there, sir?

A. Yes, there were. And talking.

Q. Which ones?

A. I-Fly, Christie's and Tiger Direct.

Q. Do you recall that, in August of 2000, Mr. Kumamoto wrote to Mr. Robertson explaining that "eBay hired Cooley Godward to assess the scope and value of these rights. We believe that the next step in consideration of this potential transaction should bb our firm's review of the prosecution histories of the application."

Do you recall that?

[593] A. If you want to show me the letter I can speed this up. I don't know if I recall it or not.

MR. RANDALL: Okay. Let's pull up DX20.

MR. STILLMAN: I'm sorry, I'm confused. Mr. Randall said this was DX20, and it doesn't comport with our DX20.

MR. RANDALL: It's not an exhibit. It's—this is not an exhibit.

THE COURT: Okay.

MR. STILLMAN: It says it's an exhibit.

THE COURT: Well, that's not the only time it's said that.

MR. STILLMAN: Okay. I'm sorry.

THE COURT: Maybe they have that label.

MR. RANDALL: Our exhibits are labeled D, then a number. The "X" means cross. But it's not an exhibit. THE COURT: That's their way of --

MR. STILLMAN: Okay. I'm sorry.

BY MR. RANDALL:

Q. Does this refresh your recollection, Mr. Woolston that, in fact, on the 24th of August 2000, an eBay representative, informed Mr. Robertson, your lawyer, that we believe the next step in consideration of this potential transaction should be our firm's review of the prosecution histories of the application.

[594] A. Where are you reading from?

Q. It is the second, second paragraph, last sentence.

A. This is after our meeting. This is, I think this is the last letter we ever received from eBay. But I could be mistaken.

Q. Does that refresh your recollection that that statement was made by an eBay representative to your lawyer, Mr. Robertson?

A. Yeah, there's a letter here. I think we received it. I don't have a specific recollection that's refreshed.

Q. On August 29, 2000, eBay's representative requested that your prosecution files be sent to Cooley, Godward's offices in Palo Alto, correct?

A. I believe so. And I believe we had a counter-proposal that said we'll make them all available to you in the D.C. office of Hunton 4 Williams and you can send your attorneys down from Reston to take a look.

Q. There were—under that proposal, sir, there would be no way for eBay to check to make sure that they actually had all of the information in your prosecution file histories, correct?

A. No, that's not true. We could have made the files available to you.

Q. But there was no way for us to check whether or not we had a complete set of the files, correct?

[595] A. Well, you could have come and looked at the files, and then if you weren't satisfied, we maybe could have given you power to inspect if you didn't believe us that it was all the files.

Q. On September 26, eBay's representative—and this is in 2000, September 262000—eBay's representative wrote to you stating "If you wish to have us evaluate your patent applications, you must send copies of the entire family of patent applications to us." Right?

A. Yes, I believe that was your proposal. You wanted copies of all of our patents, all the file histories sent to San Jose, and we wanted to make them available in Washington.

Q. Why didn't you just pack up all these file histories and send them—if you wanted eBay to review these file histories, why wouldn't you just pack them all up and send them to eBay and let eBay look at them?

A. Maybe we should have. But I had the distinct impression that, impression that eBay was trying to get a jump on this lawsuit, because you weren't dealing in good faith.

You asked me.

THE COURT: You asked him. You got an answer. Go on.

BY MR. RANDALL:

[596] Q. EBay had no idea at that time—

THE COURT: Well, not—don't testify. So let's go-ahead and—

MR. RANDALL: Yeah, I'm—

THE COURT: Ask him a question.

MR. RANDALL: I am.

BY MR. RANDALL:

Q. There was no way, at least as you understood it, for eBay to have known at that time that you had planned to sue eBay in January of 2000, correct?

A. January of 2000. Was there any way for me to have known that eBay knew that we planned to sue eBay in January 2000? Is that the question?

Q. Right.

A. No. That was public record. EBay may very well have known that.

Q. Your agreement with Aden Enterprises in January of 2000 that you had an, agreement to sue eBay, that was public knowledge?

A. Yes. It was laid open in the suit between Aden and MercExchange. It was made public. Part of the public record.

Q. When eaay and MercExchange were having these various exchanges, MercExchange never said in any one of those communications that we've gone through that eBay [597] infringes any of these patents, right?

A. You didn't infringe—eBay did not infringe the '265 patent and the '176 patent at our meeting. They did infringe the patent that subsequently became the '051 at that meeting, but we never made the charge of infringement because eBay wasn't infringing the issued patents at that, time.

Q. MercExchange never communicated to eBay in any way that eBay infringed any of its patents until you filed suit in this case, correct?

A. I don't know if that was the inference you would have taken from our meeting or not. That was the communication I had with eBay.

Q. When did you authorize suit in this case, sir?

A. Probably a couple months before we filed suit.

Q. And when was that?

A. Probably—well, I think we, this lawsuit got started in September.

Q. 2001.

A. Okay. So probably a few months before that.

Q. Okay. Prior to filing suit against eBay in September of 2001, you never communicated to eBay that it infringed any one of your patents, correct?

A. That's, yeah, that's probably correct.

Q. And you never Communicated to eBay that you had [598] this agreement with Aden Enterprises in January of 2000 to sue eBay, correct?

A. You might have had—you've got other documents out of that record, so I think you have it.

Q. No. We got those in discovery in this case, sir.

I'm asking you a question. Did you ever, before filing this lawsuit, did you ever inform eBay or have anyone on your behalf inform eBay that you and Aden had reached this agreement, this contract to sue eBay in January of 2000?

A. Probably not.

Q. Without full access to your patent file histories, no one would know about the rejections that the Patent Office had issued to your claims in the pending applications, correct?

A. I'm not sure if that's true or not.

Q. Well, the Patent Office application process is private; right? The public doesn't have access to what's specifically going on in the Patent Office, right?

A. You seem to have a way of figuring out what's going on at—

THE COURT: Just answer—no, no, no. He asked you a question. Don't ask him a question—

THE WITNESS: All right.

THE COURT:—or make a comment, just answer the [599] question. And then if you want to—

THE WITNESS: Yes, sir.

THE COURT:—elaborate on your answer, certainly you may do that.

THE WITNESS: I apologize.

BY MR. RANDALL:

Q. The Patent Office procedures are private, right? Between the Patent Office and the applicant and its attorney, right?

A. Yes.

Q. And again, I'm not talking about just finding out the application numbers, I'm talking about the office actions where the officials, the Patent Office will reject claims and then the applicant responds to those rejections. That activity is not public activity before the patent issues, correct?

A. I'm not sure if that's true under the new rules or not. It was under the old rules.

Q. All right. With respect to—strike that.

With respect to all of your activity before the Patent Office before you filed this lawsuit, all of the communications between MercExchange and the Patent Office regarding your pending applications were private, right?

A. No. We shared some of them with eBay at the meeting.

[600] Q. Before this meeting?

A. At the meeting.

Q. Let me ask you about the...

Without full access to all of your pending patent applications before the Patent Office, there would be no way for eBay or some other company to understand the Patent Office's rejections that you had received in your pending applications, correct?

A. No. They could have asked us and we could have provided them.

Q. And eBay did ask you to provide—

A. We made

Q. —the power to inspect your applications before the Patent Office and you said no, correct?

A. That's correct.

Q. I'd like to talk to you about the MercExchange settlement with GoTo.

A. Yes, sir.

Q. The agreement was both a settlement and a license, correct?

A. And a covenant not to sue.

Q. And the settlement ended the litigation between MercExchange and GoTo.com, correct?

A. Yes, it did.

Q. And the, settlement also granted a license to GoTo [601] and its parent company, or new parent company, Overture, through the life of your patents, correct?

A. I believe so. I don't want to misspeak, but I believe that's the case. There was a document that has exactly what's in it.

Q. And so the money that you received included a payment for the license grant going forward through the life of these patents, correct?

A. Yes. In effect.

Q. How much of the four million dollars that was paid by GoTo to settle this case was for a paid-up license through the life of the patent of the '265 patent?

A. I don't know. There's experts that are going to testify on this issue. I don't know how to break it up. i I'm not a licensing expert. If they broke it out, they broke it out; if they didn't, they didn't. I don't know how to break it out.

Q. You're the managing director of MercExchange and you had the ultimate decision about whether to settle that lawsuit or not, correct?

A. Well, I—yes.

Q. And you had the ultimate decision with respect to MercExchange in deciding whether or not the amount that you received was sufficient, correct?

A. Yes.

[602] Q. And you granted, in this settlement agreement,

among other things, a fully paid-up license to your issued patents and all the pending applications, correct?

A. If you—we can maybe just speed this up if we put the document in front of me.

I think the '265 was actually licensed to SpinOff. They were having Channel Advisor.

GoTo had the license. I just don't have the terms memorized.

Q. All right. GoTo had a full patent paid-up license agreements to all of your issued patents and all of your pending applications, correct? Through that settlement agreement?

A. I think so. I don't have it memorized.

Q. All right. And what was your understanding, if any, as to how much of that four million dollars was attributable to the fully paid up license to all of your patents and applications?

A. My understanding was that even though the license says they are licenses forever, we talked to the people that run the business.

Q. That's not my question.

A. You're asking me the amount attributable and I'm telling you why —

THE COURT: Why don't you say it first, and

* * * *

[605] Q. You had no idea?

A. No.

Q. Do you have any idea how much GoTo.com attributed of this four million dollars to saving their employees and management from the distraction of litigation?

A. I don't know.

Q. You have no idea?

THE COURT: He said he didn't know. Let's go on.

BY MR. RANDALL:

Q. Were you aware that GoTo.com had set aside in escrow an amount of money for contingencies because it was in the process of getting acquired by a company called Overture?

A. No.

Q. Let me ask you a few questions about the AutoTrader license.

A. Yes, sir.

Q. There was a mention about damages to Merc-Exchange because AutoTrader would not pay this royalty unless eBay were enjoined. Did you hear that?

A. Yes.

Q. And you know that AutoTrader has started a on-line auction that competes with eBay's on-line auction?

A. Yes.

Q. For cars, correct?

[606] A. Yes.

Q. And AutoTrader paid you $450,000, and you in turn promised to try to enjoin eBay; is that right?

A. No. There's a provision in there that eBay's enjoined that they would pay royalties going forward.

There's also some other provisions in there such as AutoTrader has rights to enforce the patents now in some circumstances. I don't have it memorized.

Q. The AutoTrader license addresses royalties only for AutoTrader's auction format, right?

A. I believe that's correct.

Q. Does the AutoTrader license have anything to do with fixed price sales?

A. It could. I'd need to see the agreement.

Q. You told the jury yesterday that this case covers only fixed price sales; is that right?

A. That's right. That's correct.

Q. Did you tell AutoTrader at the time that he entered

into this agreement that this case only involves fixed price sales?

A. No.

Q. Did you tell AutoTrader at the time they gave you the $450,000 that you would not be able to enjoin eBay's auction format in this case?

A. No.

[607] Q. Do you understand that AutoTrader only operates an auction format for automobiles as opposed to a fixed price format?

A. No. They have a fixed price format.

Q. Yesterday your attorney moved into evidence, I believe, Plaintiffs Exhibit 6, which was a certified copy of the '779 patent application. Do you recall that?

A. Yes.

Q. That application is on appeal, correct?

A. I believe so. Yes.

Q. And what that means is that the Patent Office has rejected—the Patent Office has issued a final rejection on all of those claims and you appealed from that, correct?

A. Yes. You can appeal from that, or continue to prosecute another way.

Q. And that's what you or your attorneys did in the '779 application, right, that's in evidence?

A. I believe it was a, there was an appeal filed, yeah.

Q. And when you file an appeal, you file an appeal brief, correct?

A. Yes. Yes.

Q. The appeal brief is not in this certified copy, and we don't have a copy of it. Do you know whether, in fact, you have filed an appeal brief in the '779

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[639] THE COURT: That's correct.

THE DEPUTY CLERK: Judge, for- clarification, on the list it's D168 and you said 68. Is the list correct? Is it supposed to be 168?

THE COURT: 168 according to what I have.

THE DEPUTY CLERK: I just wanted to make sure.

MR. RANDALL: Yes, it's 168.

(Defendants Exhibits as recited were received.)

THE COURT: And we didn't call the roll, but everyone agrees that everyone is here?

MR. STILLMAN: Yes.

MR. RANDALL: Yes.

THE COURT: Thank you. Go ahead.

CROSS-EXAMINATION

BY MR. RANDALL: (Cont'd)

Q Mr. Woolston, we talked about last Friday your various business plans for your company Fleanet, correct?

A We talked about the-business plans, yes.

Q I would like you to look at Defense Exhibit 381. I'm sorry. This is a—381 is the patent enforcement agreement that we talked about between Aden and MercExchange in which Aden and MercExchange agreed, I believe, on January 7, 2000 to sue eBay, and this is the agreement; is that right?

A Can I take a look at it?

Q Yes. Absolutely.

[640] A Go down to the bottom. All the way. Yes, this is my signature. It looks like the enforcement agreement.

MR. RANDALL: I'll move Exhibit 381 into evidence, Your Honor.

MR. STILLMAN: Could you look at your pretrial order? My page has bled off with respect to the court's rulings on that.

THE COURT: 381?

MR. STILLMAN: Yeah. I can't tell.

THE COURT: I'll be able to tell very quickly.

MR. RANDALL: Should be 00.

THE COURT: It's 00. It's admitted.

MR. RANDALL: Thank you.

(Defendants' Exhibit 381 was received.)

BY MR. RANDALL:

Q We also discussed your business plans, correct, Mr. Woolston?

A Fleanet business plans.

Q If you can pull up Defense Exhibit 53, please. MercExchange LLC, that's your company, correct?

A Yes

Q And that's the address of your company listed on this cover page of Defense Exhibit 53, correct?

A No.

Q It was at one time, correct?

[641] A Yes.

Q. Move to the next page. Is this a business plan or draft of a business plan produced by MercExchange? When I say that, I'll direct your attention to the bottom right-hand corner where it says ME, indicating a MercExchange production document.

A Yes. This is either a draft or a final that was produced, yes.

MR. RANDALL: Your Honor, I move Defense Exhibit 53 into evidence.

MR. STILLMAN: I'm sorry. Does that document have a date on it?

THE WITNESS: No.

MR. RANDALL: Your Honor, it's 00.

THE COURT: You want to know if it has a date. He asked if it had a date on it.

MR. RANDALL: He has it. They produced it. I would like to just move it into evidence.

THE COURT: It's admitted.

MR. STILLMAN: I'm just trying to figure out if the document has a date on it to reflect when the business plan was prepared.

THE COURT: I can't tell you. I don't know. Maybe you know, Mr. Randall.

MR. RANDALL: Well, I would just like to—it's in

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[644] back to me?

THE COURT: All right.

MR. RANDALL: Can you pass—could you look at the transcript?

THE COURT: I want to look at it. I will look at it. I want to know what the question was first.

(Whereupon, the question was read back.)

THE COURT: And his answer was no, but then he said no—

THE WITNESS: We didn't need to. It's the same.

MR. RANDALL: Can you pass—can you look at the transcript?

THE COURT: Let me see it. I'll just read his answer.

MR. RANDALL: Your Honor, we have a video clip of this section.

THE COURT: I know you do. I know you do, but I'm not going to let you show it until I see whether it's incorrect with what he testified to today.

MR. RANDALL: Sure.

THE COURT: "To my knowledge, we didn't do any clearance search prior to any of our commercialization efforts.

"Any of what?

"Any commercialization effort that MercExchange has [645] been involved with, that would include the Aden companies or MercExchange's own efforts, we never did a patent"—that's an answer—"clearance search.

"Why not?

"Didn't need to.

"Why not?

"Why not? Because we didn't have anybody asserting the patents against us."

BY MR. RANDALL:

Q Was that your testimony, sir?

A Yes.

Q I asked you on Friday a couple of times about the first time you had heard eBay. Did you understand my questions to include eBay and Auction Web, the name that was used previously when you responded?

A You are talking about the '95, '96, '97 time frame? I never knew about Auction Web or eBay, to my knowledge.

Q. When was the first time you ever did hear of eBay?

A EBay kind of snuck up on us and burst on the scene. I believe it was '98, sometime in '98 I became aware of it.

Q Mr. Woolston, how long would it take one of ordinary skill in the art to build and implement the inventions claimed in your '176 patent at the time you filed your application?

A I believe I said you needed to build a '265 or '265-related system first before you had something to search.

[646] I testified that I thought it would take about six man-months. Man-months, that's a project management term of one person working one month. And I believe I testified that I thought the '176 system would take a couple of months on top of that. I wasn't completely sure because it has project management issues involved. You can't put the deck on the boat before you build the hull. So some things could be done out of order and some things couldn't.

Do you recall your deposition testimony in which—strike that. Do you recall—you just answered about both, the '265 and the '176, correct?

A Yes.

Q Do you recall your deposition testimony where you stated that it would take approximately eight man-months to—for one of ordinary skill in -the art at the time you filed your application to build and implement the inventions claimed in the '265 patent?

A Jeff—Mr. Randall, I was deposed for four days and it was six months ago. If I said eight months, eight man-months, that's probably what I felt at the time.

Q Do you feel that now?

A Yes. It's six to eight man-months. You can compress the schedule.

Q Do you recall your testimony—strike that. Do you recall at your deposition testifying that it would take [647] approximately seven months for one of ordinary skill in the art, in your opinion, to build and implement the inventions claimed in your '176 patent at the time you filed your application?

A Yes. But I think I answered that in the context of you needed something to search first. You needed a deck—you need the hull before you put the deck on the boat. I might have been inconsistent in the deposition of how many man

months. I thought it was a fairly complex line of questioning with project management thrown in there.

Q Well, is that correct, that it would take approximately seven—

A It could be.

Let me finish my question. It would take approximately seven months for one of ordinary skill in the art to build and implement the inventions claimed in your '176 patent at the time you filed the application?

A Yes, I think that's right. It would take six to eight to build the '265, and then maybe another month or two on top of that for the '176. But things—schedules could be compressed with project management and resources.

Q You testified in your deposition that it would take seven months for the '176. Do you recall that?

A I think I'm testifying consistently with what I said before.

[648] MR. RANDALL: One minute, Your Honor. Your Honor, could I hand the witness his deposition testimony and ask him if it refreshes his recollection?

THE COURT: All right.

MR. RANDALL: Thank you.

THE COURT: Have you had a chance to read it?

THE WITNESS: Yes, sir.

BY MR. RANDALL:

Mr. Woolston, does that refresh your recollection, that it would take, I think you stated, six plus an additional four weeks?

A No, that's not exactly what I said. It's entirely consistent with what I'm saying here today.

Q That it would take eight man-months to build the '265, is that right?

A I said, I qualified the answer. "There'd be logistical lag in getting all the parts in front of you, but once you had the parts in front of you, I'd say about—this is my opinion. I don't really feel qualified to answer it—eight man-months." That was for the '265. And then you asked about the '176, and I said -I believe about another month.

Q It says, does it not, six plus an additional four weeks? Is that what it says, sir?

A Yes. It says—well, it says more than that.

Q One last thing, Mr. Woolston. Why did you tell [649] Mr. Sherman that you had the idea of the consignment node invention about December 1994?

A I don't know. Maybe because it took me that, long to - reduce it to practice from the August date. It took six, seven months to actually reduce it to practice as is sufficiently described to file a patent-application.

Q So is that—is it your recollection, in fact, you first had the idea for the consignment invention about December 1994?

A December of '94?

Yes.

A There have been indications, as I testified in my deposition, that I had a plan out to raise money as early as' '94. It's not a date that I recall. We have never been able to find the document. It's interesting that you found that, though. It's the second document that we've seen that shows a date earlier than that August date that was a firm memory of in my mind.

Q. That wasn't my question. My question was did you. first have the idea for the consignment node invention about-—in about December of 1994 as you told Mr. Sherman in a letter? A I think I wrote the letter to Mr. Sherman in 1996. That was certainly much closer in time to the '94 date. .And as I testified at deposition, we had another indication that I may have been thinking about as early as December-of '94.

[650] Does it refresh my recollection as to a '94 conception date? Is that your question? It does, but it doesn't give me any memory. It's just so long ago. It wouldn't surprise me one way or the other.

Q If you first had the idea for the consignment node invention in December of 1994, that would surprise you?

A It seems very early. .It's possible. It's possible.

MR. RANDALL: I have no further questions of this witness at this time, Your Honor.

MR. STILLMAN: We'll be very brief.

THE COURT: That's what we call redirect. So you all know, that when a lawyer asks questions in direct examination, then the lawyer on the other side obviously has the chance to cross-examine a witness. And then the lawyer who asked the direct questions is allowed to, in most cases, ask questions what we call redirect in order to sometimes clarify some of the questions or answers that were brought out in cross-examination. And then if appropriate, then the lawyer on the other side gets to recross. So I just wanted you to understand what's happening here.

REDIRECT EXAMINATION

BY MR. STILLMAN:

Q Mr. Woolston, Mr. Randall on his cross-examination asked you a number of questions about an article that was entitled From Army Knives to Gold Coins Do you recall that question?

[651] A Yes, sir.

And I think your testimony was that you are not aware of that article during the prosecution—well, let me just ask you this. Were you aware of that article during the prosecution of the '265 and the '176 patents?

A No, sir.

How did you become aware of it, sir?

A We had another patent, an auction patent that's related to auction, not the fixed price we talked-about here today. The patent office examined the auction patent and allowed it over that reference.

Q. You say the patent office examined that article?

A. Yes, sir.

Q And allowed your patent application over that article?

A Yes, sir.

Q What do you mean when you say the patent office allowed your application over that article?

A It considered it along in combinatjon with the other inventions that were prior to us and determined that we were patentable, complied with all the laws, and that a patent should be awarded.

Q Notwithstanding the art disclosed in the article?—

A That's correct.

Q Once you became aware of it, did you disclose that article to the patent office in your other patent [652] applications?

A Yes, sir.

Q. Mr. Randall also discussed some articles about the OnSale auction system. Do you recall that?

A Yes, sir.

Q. Were you aware of the OnSale articles at the time you filed your original patent application?

A No, sir.

Q. How did you become aware of that?

A I think the office—yes. The office found that article, examined it in, the context of that auction patent we were discussing.

Q. And did the patent office allow the '176 patent over that article?

A Yes, sir.

Q. Were other patent applications allowed by the PTO over those articles?

A Yes, sir.

Q. Which ones were they?

A I believe the two-tiered patent. That's the '661 that's not in this case. That was allowed twice over that. Certainly the PriceLine matter was allowed over that, and I believe we've had another indication allowance. In this case, I don't have a specific recollection of which one, but it was allowed over that.

[653] You recall that Mr. Randall also mentioned some articles about automobile auctions. Do you recall that?

A Yes, sir.

Q. When did you first become aware of those articles?

A Those were discussed in the '265. Those were examined by the office. We discussed that with the office.

Q So the patent office was aware of those articles when they were considering your application for the '265 patent?

A Certainly.

Q And was the '265 patent granted over those articles?

A Yes, sir.

Q Do you have any idea of how many prior art references the patent office considered in connection with the examination of the '176 patent application?

A No, but it's many. It's on the cover page of the patent. It's the one that have been made an official record.

Q Would it have been as many as 50?

A Quite possibly.

Q Mr. Randall also mentioned to you a patent that was owned by Mr. Nahan. Do you recall that?

A Yes, sir.

Q Were you aware of the Nahan patent during the prosecution of the '265 or the '176 patent applications?

A I don't believe so, no.

Q How did you become aware of it, sir?

[654] A I think we became aware of it that the patent office had considered many, many references and allowed the patent that's at issue, the '176. There were some issues through

some claims that the patent office did not allow in that case that we elected to continue to prosecute with the patent office. They were allowed in the '176. And I believe the examiner discussed the Nahan reference with us in that case as well. Didn't really matter to us because those claims were never allowed in the '176 in the first place.

Q Mr. Randall mentioned to you or showed you something called your Fleanet business plan. Do you recall that?

A Yes, sir.

Q Was that business plan ever designed to be a complete commercialization of any of your inventions?

A No, of course not.

Q What is the relationship between the Fleanet business plan and your claim in the claims of your invention in this case?

A None really. EBay doesn't infringe the business plan.

Q Is there anything in your claims, in either the '265 patent Or the '165—or the '176 patent, that requires a trusted intermediary to take physical possession of the goods?

A No, sir.

Q There was some questions and answers with Mr. Randall regarding when you contend that eBay began to infringe the [255] '265 patent. At the time that you disclosed an integrated transaction processor as an element of your claims in the '265 patent, did eBay have an integrated transaction processor?

A No, sir. Not that I'm aware of.

Q Is there anything in your claims that suggest that you are claiming to invent e-commerce or selling goods through the Internet?

A No, sir, of course not.

Q Have you had an opportunity to look at any of the eBay patent applications that are exhibits in this case?

MR. RANDALL. Your Honor, that's outside the scope of cross-examination.

MR. STILLMAN: I'm going to make it relevant if I get a chance to ask the next question.

MR. RANDALL: It's outside the scope.

THE COURT: Redirect has to do with cross.

MR. STILLMAN: I agree, and it will be directly relevant because it has to do with Nahan patent reference.

THE COURT: All right. I'll let him answer the question, certainly.

MR. STILLMAN: And I don't know what his answer is going to be.

BY MR. STILLMAN:

Did you have an opportunity to look at any of the eBay patent applications?

[256] A You can see them laying open in Europe. I have taken a look at some of those.

Q Have you seen any citation to the Nahan patent in any of the eBay patent applications?

A I have not.

Q Anything in your claims with respect to the '176 or the '265, Mr. Woolston, that requires one who, as a trusted intermediary to, quote, add value to the good?

A No, of course not.

Is there anything in the claims of the '265 or the '176 that limits participants to consignment stores?

A No, of course not.

Q Is there anything in the claims of the '265 or the '176 patents which requires that the trusted intermediary physically inspect the goods?

A No.

Q You testified in response to a question from Mr. Randall that you conceived the inventions of the '176 patent on your drive to work. Do you recall that testimony?

A Yes, sir. It was a date I remember having it.

Q All right. How long did it take you to reduce that conception to practice, sir?

A It took six or seven months of diligence to reduce it to practice. Maybe even eight months.

MR. STILLMAN: I think that's all I have. Thank [657] you.

THE COURT: Mr. Randall.

RECROSS EXAMINATION

BY MR. RANDALL:

Q You talked about the Army Knives to-Gold Coins article. Do you recall that testimony just a few minutes ago?

A Yes, sir.

Q Actually, what the patent examiner did in that '051— patent application was rejected all of your claims, every single one of them, based in Part on-the ACORN Network as described in Army Knives to Gold Coins?

A Yes.

Q Is that right?

A But then she allowed them

Q Is that right?

A Well, they were eventually allowed.

Q If you just answer my question, we'll get through this fast. All of your claims during the prosecution of the '051 application were all rejected over prior art, including From Army Knives to Gold Coins, the description of the ACORN Network, correct?

A Yes. Hut it wasn't the-claims that were allowed.

Q And then in order to get over the prior art or get around the prior art, you added what is called a seller's account and debiting and crediting a seller's account, correct?

A We remitted the claims that, among other amendments, was submitted to the patent office, yes.

Q All of your claims stood rejected in light of the ACORN Network-until you changed your claims to add this seller's account and debiting and crediting a seller's account, correct?

A Just to be clear, we are talking about a patent that's not in the suit. We amended the claims to include that and other limitations, sir.

Q And those other limitations and those other elements, seller's account and debiting and crediting a seller's account, they are not at issue in this case, correct?

A That's correct.

Q. Nor is the '051 in this case, is it?

A That's correct.

MR. RANDALL: No further questions, Your Honor.

THE COURT: Is that it? Thank you, Mr. Woolston.

THE WITNESS: Thank you, sir. You may step down. (Witness excused.)

THE COURT: Next witness.

MR. ROBERTSON: Your Honor, plaintiff is going to be calling Dr. Alfred Weaver from the University of Virginia, and Mr. Randall on Friday had represented to us that he anticipated that Mr. Woolston was going to go the entire morning. I need about five minutes to—I understand how [659] these things change.

MR. RANDALL: I didn't say that.

THE COURT: No. There was some reference made that' maybe—I'm not sure the jury was here. There was some reference that it might take a little longer. I think he said-one hour.

MR. ROBERTSON: Fair enough; Your Honor. We are not suggesting—

THE COURT: You want to break to see whether your witness is here?—

MR. ROBERTSON: I think my witness is here. I just need about five minutes to set up, and I-didn't want to inconvenience the jury while we were arranging the exhibits_ and notebooks.

THE COURT: Why don't you go into the jury room and relax for a few minutes.

(Whereupon, the jury departed the courtroom.)

MR. RANDALL: Your Honor, I don't have a problem if Mr. Robertson just needs some time to set up, that's fine. But to suggest that I said I was going to take all morning, it's not right in front of the jury.

THE COURT: Let's just watch it. I remember he said he thought it would take about another hour.

MR. ROBERTSON: I apologize, Your Honor. I didn't recall that.

[660] THE COURT: The next time anything like that happens, if you need some time—I'm looking at both counsel right now—let's just don't say anything other than Your Honor, I would like five minutes or 10 minutes in order to set up without going into any reasons why. Okay.

MR. ROBERTSON: Yes, Your Honor.

THE COURT: All right.

(Court recessed at 10:20 a.m., until 10:25 a.m.) THE COURT: Are you ready?

MR. ROBERTSON: Yes, sir.

(Whereupon, the jury returned to the courtroom.)

ALFRED WEAVER, a witness called on behalf of the Plaintiff, after having been duly sworn, was examined and testified as follows:.

THE COURT: Go ahead.

MR. ROBERTSON: Thank you, Your Honor.

DIRECT EXAMINATION

BY MR. ROBERTSON:

Q Six, could you please state your name for the record?

A Alfred C. Weaver.

Q Good to see a fresh face, Dr. Weaver. I guess we are making progress now.

THE COURT: Let's just start:

BY MR. ROBERTSON:

Q Please tell us, sir, your current occupation.

[661] A I'm a professor at the University of Virginia.

Q And what courses do you teach?

A My specialty there is electronic commerce. I do the computer networking course, two courses in electronic commerce, one undergraduate and one graduate course. And this semester I'm doing the introductory programming course that's taken by all engineers and scientists at the University of Virginia.

Q And can you briefly give us your educational background starting with college?

A Sure. I got a bachelor of science degree in engineering science from the University of Tennessee in 1971. Went to the University of Illinois. Got a master's of science degree in computer science there in 1973. Stayed for the Ph.D. Was awarded the Ph.D. in computer science at Illinois in 1976.

Q And could you just briefly describe what your duties and responsibilities are as a full—tenured professor at the University of Vermont—University of Virginia, excuse me?

A As with most large universities, tenured faculty, full professors have really three main areas of work one is teaching, the second is research, and the third is service to the professional community.

Q Do you teach a number of undergraduate and graduate courses?

A I do both, yes, I do.

[662] Q Have you ever been the chairman' of the Department of Computer Science at the University of Virginia?

A Yes, I was.

Q Have you started any initiatives within the department or with regard to your area of expertise in computer science?

A Yes. Early -

Q I'm sorry. Go ahead.

A Early on when I came to the University of Virginia, I started our first microcomputer laboratory. In 1980, I started our computer networking group. And then more recently, 1995, I started our electronic commerce activities which includes a research group called the Internet commerce group, and also two courses, undergraduate course and a graduate in that topic.

Q You mentioned computer networking. Do you consider that to be one of your specialties within your area of expertise? A Yes, sir, I certainly do.

Q Have you ever had occasion to work for any governmental agencies?

A Oh, yes.

Q Which one?

A Well, currently I've got work going on with the National Science Foundation. I have previously done work with the Federal Emergency Management Agency. I had a sabbatical at NASA down in Houston at the Johnson Space Center.

[663] Q And at NASA, can you tell us what type of work you do—that you conducted for NASA?

A At NASA, I was working on the international space station, and I was analyzing the designs that the contractors were making for the computer communications network on the space station.

Q Have you ever consulted for any companies?

A Oh, yes.

Q Can you just give us a few examples?

A I consulted with General Electric, Lockheed Martin, Honeywell, Raytheon, E-Systems, several more.

Q Have you ever been an expert in a patent case before?

A Yes.

Q On approximately how many occasions?

A Three times.

Q Have you ever testified in court before?

A Yes.

Q Have you ever testified in front of a federal judge in the Eastern District of Virginia where this case is situated?

A Yes. One time.

Q Can you tell us the name of that judge?

A That was Judge T. S. Ellis.

Q And were you qualified as an expert to testify in the area of computer science in that case?

A Yes.

[664] Q Can you tell us what type of case that was?

A That was a criminal case.

Q What did it involve?

A That involved a question of whether or not an individual had committed data theft from a bank.

Q And did Judge Ellis qualify you as an expert in that case?

A Yes.

Q And what was the outcome of that case?

A The man was convicted.

MR. ROBERTSON: Your Honor, I would offer Dr. Weaver at this time as an expert in computer science and computer networks.

THE COURT: Any questions or any objections?

MR. RANDALL: No objections.

THE COURT: Okay. He'll be qualified to testify in the fields of computer science and computer networks.

BY MR. ROBERTSON:

Q Dr. Weaver, can you tell us were you were retained by MercExchange to provide opinions in this case?

A August 2001.

Q And specifically, were you retained with regard to an analysis of the infringement and validity of the '265 patent' as it applies to defendants eBay and Half.com?

A Yes, I was.

[665] Q Have you in fact reviewed the-'265 patent?

A Yes, I have.

Q On how many

A Countless.

Q Can you tell me just generally, is there-any-kind of particular logic or sort of structure to the '265 patent that might be helpful to the jury in understanding what the subject matter of that patent is?

A Well, the general subject matter is how to buy, and sell items over the Internet, and the general structure is that the patent presents two systems. One is an electronic market in. which descriptions of items that are for sale reside, and then these can be accessed by potential purchasers by looking at them over the Internet. And then there is a system that allows a potential seller to describe his item and add a picture and post it to the electronic market so that it's available for people to look at.

Q You mentioned there is a system for posting or presenting it to an electronic market. Did I understand that correctly?

A Yes.

Q Are you familiar with the term "posting terminal apparatus"?

A Yes.

Q What's your understanding as to what a posting terminal apparatus is?

[666] A That would be a device like a computer, maybe my home computer, that is capable of sending information over the Internet. In this case, it's to the electronic market. And you also mentioned these is the electronic market which can actually present the goods to potential buyers. Is that also the subject of the '265 patent?

A Yes indeed.

Q So we have on the one hand sellers presenting goods to the market and on the other hand markets presenting goods to potential buyers. Is that your understanding?

A That's correct.

* * * *

[670] A No, not officially anyway. The government had funded the development of what we now call the Internet, and there was a proscription against using it for commercial activity. Some people did it anyway until 1995 when that proscription was lifted.

Q Do you know when in particular in 1995 the proscription for commercial activities on the Internet was lifted?

A It was May 1995.

Q Can you tell the jury what appears on the screen here?

A This is the front page, cover page of Mr. Woolston's '265 patent.

THE COURT: Do we have it on the other screen, the one next to the witness?

MR. ROBERTSON: I would hope so.

THE WITNESS: Yes, sir.

THE COURT: is that easier for you, Dr. Weaver?

THE WITNESS: I'll manage. Thanks.

BY MR. ROBERTSON:

Q Do you know when Mr. Woolston first applied for his '265 Patent?

A He has an application date on the patent. This particular one is filed November 7, but it is a continuation, in part, from an April 1995 application.

Q And is that a month before, approximately, you're your understanding is that the government opened the Internet for [671] electronic commerce operations?

A Given the date, it's a week before.

Q Why don't we go to the claims of the '265 patent, if we could, Dr. Weaver, and it should be on the screen right next to you, and let's start with just claim 1. You mentioned before that there were two aspects of the '265 patent: that is, there is the electronic market and then there was this system representing a data record of a good for sale to the market. Do you see that?

A Yes, I do.

Q Which claim is this directed to?

A Well, as you can see there in the first phrase, a system for presenting a data record of a good for sale to a market for goods. This is talking about the posting terminal that is going to allow a user to describe an item and then electronically move that information into the market for goods.

Q What's your understanding with regard to this—what this first paragraph of claim 1 consists of?

A It is hard to see or hard to read, rather. The first sentence is describing the system for goods, and then the second phrase said market for goods having an interface, etc. This is kind of providing a context for these two systems, the posting terminal and the market for goods.

Q Are you familiar with the term preamble?

[672] A Yes.

Q Do you have an understanding with respect to what a preamble is under—for a patent?

A I believe, as we see here, this preamble is setting up the general environment of which the claim is to operate.

Q The claim begins, A system for presenting a data record of a good for sale to a market for goods, and then it has a number of descriptions of what the market for goods contain. Is that your understanding?

A Yes.

Q And then it says, Said system comprising. Do you see that at the end of the preamble?

A Right. I see that.

Q Do you have an understanding as to what the term "comprising"° means?

A Yes. That means that it includes, but is not limited to, the things that are to follow.

Q So let me see if I understand. If we were to scroll down and take a look at the rest of the claim here, we have the number of elements. Do you see that?

A Yes.

Q For example, we have a digital image means, which is the first element?

A We do.

Q And then we have a user interface, second element?

[673] A We do.

Q And continuing, we have a bar code scanner, and then I think we have seven total elements. Do you see that?

A Yes. I count seven.

Q In order to infringe this claim, then, what's your understanding with regard to what the plaintiff needs to establish to this jury as to whether one of the defendants, for example, would infringe it?

A Well, the plaintiff would have to show that each and every element of those claims—the elements of those claims are present in the infringing instance.

Q What if, in addition to these seven elements, I had, for example, elements 8, 9 and 10. Would that preclude infringement of this claim?

A No. That would have no relevance on the determination of infringement.

Q So this word comprising that you indicated, that means you need to have the elements that are set forth there; but if you have additional elements or additional features or functionality, for example, does that avoid infringement?

A No. The additional elements, if there are—I shouldn't call them elements. Additional factors just don't make any difference with regard to the determination of infringement.

Q Why don't we take a look at claim 26 of the '265 patent. Again, focusing just on the preamble for the moment. The [674] first claim we looked at, at claim1, you indicated was this posting terminal apparatus or, in your instance, you said a home PC that would allow you to present a good in the electronic market. What do we have here in claim 26? What type of claim is that?

A This is the other half. This is the electronic market itself.

Q You say "other half." Can we understand, then, the '265 patent to have sort of two sides to the equation: that is, on one side we have potential sellers who are going to use this equipment to present goods for sale to the electronic market, and then on the other half we have the electronic market that are going to present goods to potential buyers, process the transaction, and do additional steps in order to complete the sale. Is that your understanding?

A That is my understanding of what the patent and the claim is about.

Q What we have done here, Dr. Weaver, is we have placed in front of you a demonstrative. Can you tell us a little bit about this demonstrative? I know you can't see it, but I think you have seen it before.

A This is the entire claim 26. And so what we should see at the top of there is the preamble and then followed by the elements of the claim itself.

Q Why don't we see if we can show some of the elements of

* * * *

[804] What is reflected at the bottom here where the two forward slashes that start with the sentence "check"?

A. Those two forward slashes is a comment in what is otherwise the programming language, and this is a note to the programmer reminding him or her what the next programming is going to do. So this says "check to see if the IP"—that is, the Internet Protocol address—"in cookie matches," and then it continues on the top of the: next page.

"To see if it matches the current IP address."

Q. There's a few things then you've mentioned in that answer. First there's this IP address?

A. Right.

Q. And I think we addressed that briefly this . morning. I don't want to rehash it, but just in a sentence can you tell the jury again what that IP address was?

A. So that is the Internet naming or numbering convention that identifies a computer, and that was that

A-dot, B-dot, C-dot, D number.

Q. Is this cookie a code?

A. Yes.

Q. Is it predetermined by eBay?

A. Oh, it's predetermined for sure, because the eBay server writes it onto the posting terminal.

Q. And can, eBay, from placing that code on your[805] computer, verify that the-code is coming from a computer that's an authorized user of eBay?

A. Yes. That's what this code does.

Q. Is that important in this case?

A. Yes.

Q. What would happen if eBay didn't use cookies to verify that the computer that's posting onto its website Was an authorized user?

A. Well then, they wouldn't infringe some of those independent claims we talked about.

Q. Would it be a practical solution?

A. Probably not. Everybody uses cookies these days.

Q. Why is a cookie important?

A. Well, it's a standard way of writing information. It's easy, it's supported by all-the web servers and browsers.

Q. Well, if I disabled the cookies, can the eBay system operate in the same way?

A. Well, not in the same way.

Q. Okay. How would it operate?

A. Well, you wouldn't be able to use the cookie to provide your verification, so instead you'd probably have to sign in again with your eBay user ID and your password each time you wanted to post any information;

Q. Well, that's why I want to understand. From the [806] seller's perspective, the person who is, in fact, posting an item for sale, if I did not permit eBay to put this predetermined identification code on my computer, would it present me with problems in utilizing eBay's service?

A. Guaranteed.

Q. And how would that impact on me as a potential seller if they didn't put this code on my computer?

A. You wouldn't be able to post anything to their site.

Q. And you indicated that eBay doesn't have to put these cookies, these codes on your computer, correct?

A. Right.

Q. Do you know if eBay's taken any steps during the pendency of this lawsuit to stop placing cookies on the computers of sellers?

A. I'm not aware of any. They were there last week.

Q. Okay. Do you know whether or not eBay's indicated that, in order to avoid infringement, it could simply disable the cookies?

A. I've read that in one of the reports that has surfaced through this case.

Q. But again, to your knowledge, eBay hasn't done that, have they?

A. They haven't done that. At least not through last week.

* * * *

[808] have testified that their system would not work without cookies?

A. Yes. Mr. Balijepalli, who is the chief technical officer at Half.com simply said straight out that Half.com will not work without cookies.

Q. You indicated that cookies today are one of the accepted protocols. Were they known in 1995?

A. Yes.

Q. Okay. Were they as common as they are today?

A. No.

Q. This fourth page of exhibit 528 under this eBay Cookie Format, it says "an eBay cookie has the following format." Do you see that?

A. I do.

Q. What if anything is significant that we should focus on here?

A. Well, I don't expect the jury to understand all the nomenclature here. This is kind of a standard way in computer science of expressing what the fields of the information are. It's called a Backus-Naur form. Down there at the bottom where you see on the left, Security Zone. This is the explanation of the content of a cookie, and that comes from the line above. So it's the explanation of what security zone is. And it says that Included in the cookie is the client's IP address.

[809] So for us, the client is the browser, and in this case, it's the seller who has to be authenticated.

Q. There is a phrase there entitled Hashed Cookie Value. Do you see that?

A. I do.

Q. What if anything do you understand that to mean?

A. The hashed cookie value, well, that's an even more technical topic. The eBay cookie system uses another

industry agreement of a hash function called MD5, Message Digest 5. And what it does is to, it computes a function over the cookie and produces something, I'll just call it a digital fingerprint. It's a number with lots of digits in it. Like 50 digits. You can only get that digit by making this computation, or you can only get that number by making this computation. And the whole purpose of that is you can't fiddle with the parts of the cookie. You can't change them and then have it hashed to that same value. So it's a protection and security mechanism.

Q. Now, do you recall during your deposition you were asked a question by Mr. Sorbet, one of eBay's counsel, with regard to whether or not you could simply take a cookie from your machine and perhaps go down to a colleague's computer, place that cookie on it, and then eBay would recognize that computer as you?

A. Right. I remember that question well.

[810] Q. Okay. And at the time what did you indicate?

A. I thought it would work.

And then when I thought about that some more, I was curious about that and I reread this document. And according to this document, if you moved that cookie, that changes some of the environment variables with which this cookie was hashed, and so now I think it will not work.

Q. Is the hashing of the cookie intended to prevent that incidence?

A. Yes.

Q. Have you ever heard of hashing to be compared to—is there any analog for hashing, for example, that would indicate that it's unique?

A. That hashes are unique?

Q. Yes.

A. Well, let's say if not absolutely unique, with a well-defined hash function, there's extremely low probability that you Could hash information and get the same—that you could hash different information and get the same hash value.

Q. Are you familiar with the term a digital fingerprint?

A. Yes.

Q. Is a hashed cookie value a digital fingerprint?

A. I think that's kind of a big-picture way of [811] looking at it, yes.

Q. If I simply removed the client-IP address, is a cookie still a predetermined code?

A. Yeah. Because it was written there by the eBay site.

Q. So the fact that the IP address is part of this code or not part of this code really doesn't matter as about whether or not it's a predetermined code that's been placed on your computer terminal for purposes of authenticating that terminal; is that correct?

A. Right. The cookie, whatever it is, whatever its content, is written onto your machine by eBay. So whatever's there, that's the code.

MR. ROBERTSON: Your Honor, might this be a good breaking point?

THE COURT: We'll take our break.

(Recess taken.)

THE COURT: Mr. Robertson?

MR. ROBERTSON: Thank you, Your Honor.

BY MR. ROBERTSON:

Q. Dr. Weaver, before the break we were talking about exhibit 528, which was entitled the Engineering Requirements document for the V3 Cookie Design and Implementation, and specifically we were on the page that ended with 038. Do you recall?

[843] ROBERTSON:

Q. Dr. Weaver, claim 26 recites an electronic market for use with a Posting terminal apparatus. Is it your opinion that eBay is an electronic market?

A. Yes, it is.

Q. Is it your opinion that they're an electronic market as this Court has defined that term?

A. Oh, yes.

Q. And when you posted goods for sale and through [844] these demonstrations, did we have a positive terminal apparatus that used a digital imaging device for creating a digital image of a good for sale and a computer interface for creating a data record of the good for sale and a communication interface for communicating with the electronic market?

A Yes. We had all of those.

Q Does eBay have a communications interface for communicating with the Posting terminal apparatus?

A. Yes, it does. We saw that.

Q Just refresh us on chat that was.

A. That was the Internet connection.

Q Does eBay have a Posting communications handler operably connected to the communications interface, the communications handler receiving inputs for a data record of the good for sale from the posting terminal apparatus, the communications handler detecting a predetermined posting terminal identification code from the posting terminal apparatus verifying from the code that the Posting terminal apparatus is an authorized user of the electronic market? Does eBay have that element?

A It does. We saw it. We saw documents describing the cookies and we saw documents describing the API and the verification Process.

Q Does eBay have a storage device that's operably [845] connected to the posting communications handler, the storage device adapted to receive and store a data record of a good for sale, the data record indexing an image of the good for sale, a textual description of the good for sale, and a code for the good for sale?

A. We saw all of those in the demonstration and we saw documents explaining the use of the Oracle relational database.

Q Dr. Weaver, does eBay have a presentation mapping module operably connected to the storage device and a wide-area communication network, the presentation mapping module providing via the wide-area communication network, an interface to the electronic market for a participant, the presentation mapping module providing the participant with access to the data record, textual description and image of the good for sale?

A. Yes. We saw that in the demonstration several times as we were able to do a View Item and see the Item that is available for sale. That's the operation of the presentation mapping module.

Q Dr. Weaver, does eBay have a transaction processor as part of its system, operably connected to the wide-area communication network and the storage-device, the transaction processor adapted to receive a Purchase request and electronic payment information from the participant [846] transfer the purchase request to the posting terminal and verify the electronic payment information from the participant, and if the electronic payment verifies, then notify the owner of the good for sale by modifying a data record indexed to the data record for the good for sale to reflect the purchase request of the good for sale by the participant?

A. Yes. We saw that when we made a sale. And the credit card was processed.

Q Dr. Weaver, does eBay have a notification module operably connected to the transaction processor, the notification module providing notification to the posting terminal apparatus, in response to the transaction processor processing the purchase request and verifying the electronic payment information?

A. Yes. It does. We saw that twice. Once with the email and once with the updating the status of the goods.

Q Dr. Weaver, in your opinion does eBay infringe claim 26?

A. Yes, they do.

Mr. ROBERTSON: Your Honor, may I present claim 15 to the jury?

THE COURT: All right.

BY MR. ROBERTSON:

[970] BY MR. RANDALL:

Q. Mr. Weaver, you testified earlier about eBay's positions about some things. I want to ask you about MercExchange's positions. MercExchange's position al along has been the '265 patent does not require a trusted network, correct?

A. Sorry. No. The Court's ruling was the trusted network, and certainly we adopted that.

Q. And before that, MercExchange's position and your position was that the claims do not require a trusted network, correct?

A. Our position was that it actually didn't matter. So when the Court construed the term to mean trusted network, that was not a problem.

Q. And you agree with—you've read the Court's Markman opinion?

A. Yes.

Q. And you agree with everything in it, correct?

A. Well, yes.

Q. Thank you. With respect to authorizing posting terminals, you're familiar with that requirement in the '265 claims?

A. Yes, sir.

Q. MercExchange's position there was that if you authorized users, that that would satisfy that element. And

* * * *

[972] A. Yes.

Q. And you now know that the '265 claims require transfer of legal ownership, correct?

MR. ROBERTSON: Objection, Your Honor. That's not the Court's instruction. It misstates the Court's Markman ruling.

THE COURT: He can answer the question. You know, read the glossary and then—I'm sure you have. I'm not telling you to—

THE WITNESS: Sure. I was going to read your instructions. Let's see which paragraph that is.

THE COURT: Can you help him out? Do you know?

MR. ROBERTSON: Paragraph 20, Your Honor, your glossary.

BY MR. RANDALL:

Q. Let me see if I can speed this long. You agree, do you not, Dr. Weaver, that at least claims 8, 15, and all of its dependent claims, require transfer of legal ownership, correct?

A. Transfer of legal ownership.

Q. Is that right?

A. Transferred ownership

MR. ROBERTSON: Objection, Your Honor. That again misstates the claim.

[973] THE COURT: Why don't you read is this 20? Is this paragraph 20?

MR. ROBERTSON: It's paragraph 20.

THE WITNESS: Paragraph 20.

THE COURT: Okay.

A. "If said payment means clears, then transfer the ownership of said good for sale by modifying said date record of said good for sale to reflect the new ownership of said good for sale by said participant." So certainly it says transfer ownership.

Q Thank you.

MR. ROBERTSON: Well, Your Honor -

MR. RANDALL: Wait a minute, Your Honor, this is -

MR. ROBERTSON: That's not the Court's construction. That was the claim language. I thought you asked -

THE COURT: Yeah. Read the Court's construction.

A. "If the payment made by a participant for a good for sale clears, then the legal ownership of the good is transferred by modifying the ownership entry in the data record of the good to reflect that the purchasing participant is the new owner." So this is saying that that legal ownership is affected by modifying the ownership entry.

* * * *

[983] of ownership requirement, right?

A. Yes.

Q. Now, that's required by claims 8, 15 and the dependent claims that flow from that, right?

A. Yes, that's correct.

Q. And those dependent claims are 9 through 14 and 16 through 21, correct?

A. 16 through 22, but all of those are not asserted, 9 as you know.

Q. All right. And just so we all understand the issue here, and we've already talked about transaction processor, but I want to talk about eBay, because before we left you said that you thought eBay transfers legal ownership of goods, correct?

A. What I said was that eBay, PayPal and Billpoint are very difficult to distinguish. And what the claim says is that transfer of ownership is affected by modifying the data record. And what I showed is that the data record had been modified. That was the point I was making.

Q. All right. Well, the record will speak for itself, and it's been transcribed. But I want to ask you about, if eBay does

not transfer legal ownership of the goods, would you agree—strike that. If eBay and Half.com do not transfer legal [984] ownership of the goods by whatever mechanism, then you would agree that neither eBay nor Half.com infringe claims 8, 15 and the dependent claims, correct?

A. I think that, that's a fair statement, because the Court's construction was that legal ownership of the good is transferred by modifying that data record.

Q. Now, I understand you disagree with this point, but I still want to ask it. If, in fact, claim 26 requires transfer of ownership of a good, then you would agree that claim 26 and its dependents are not infringed if eBay and Half do not transfer legal ownership of a good, correct?

A. That's right. But to do that you would have to overrule the Court's decision.

Q. Well -

A. The Court's construction of the claim.

Q. The jury hasn't been instructed yet, have they?

A. Actually I don't know.

Q. Okay. Does eBay know who owns goods that are listed on its site?

A. Help me out. Is this eBay the company?

Q. Yes.

A. EBay the computer? How much personification is in that question?

Q. Well, you've been using eBay to say that eBay infringes?

* * * *

[990] Q. Well, that's after the fact, isn't it, sir? A payment confirmation, that means something's already happened, right?

A. By confirmation I mean the exchange of data between PayPal and eBay or between Billpoint and eBay that says payment for this good has been processed, and the fact that information is sent back to eBay indicating that the payment

has cleared and that here's the new owner of the good. That's what I think authorizes eBay to change the those data records.

Q. Are you relying, sir, on any contract or any written document that, in your opinion, gives eBay the right to transfer ownership to goods?

A. I think that's just common sense, that when the item is paid for, there's a new owner.

Q. Well, my questions really are geared towards finding out how, in your opinion, eBay comes into that position of being able to transfer ownership. And you said that you believe they are authorized to transfer ownership, and so my questions really are pointed to what evidence do you have that you're relying on to say that eBay, all of a sudden, becomes authorized at some point when payment's made, to transfer ownership?

A. Let me try to explain that again. The very fact that PayPal and Billpoint are processing the payment and

* * * *

[995] ownership.

Q. You're not a lawyer, and you don't have any legal experience, correct?

A. Correct.

Q. Okay. Assume for a moment that, with respect to the goods listed on eBay and Half.com, that they are governed by the Uniform Commercial Code. Would you agree that the transfer of legal ownership does not occur until that good is actually delivered to the buyer?

A. I just don't know.

Q. EBay does not deliver the goods to the buyer, correct?

A. Correct.

Q. Okay. And if the UCC applies, you would agree that eBay does not transfer ownership of the goods; is that correct?

A. I just, I really don't know.

Q. Would you agree that eBay does not—strike that. If the UCC applies, would you agree that eBay cannot possibly transfer ownership of the goods by modifying a data record?

MR. ROBERTSON: Objection, Your Honor. This is now argumentative. It's been asked and answered.

THE COURT: Sustained.

BY MR. RANDALL:

* * * *

[1036] A. At some point in the past?

Q. You didn't—

A. Well, the point in the past was before the Markman ruling.

Q. I understand that.

A. Yes.

Q. But that's what their position was, right?

A. Yes.

Q. Okay. And so you understand, do you not, sir, that if the jury finds that eBay and Half.com do not have this trusted network within the meaning of this patent, that eBay and Half don't infringe any of the claims, right?

A. Probably true.

Q. It is true, isn't it, sir?

A. To the best of my knowledge, yes.

Q. Would you agree, sir, that neither eBay nor Half owns the goods that are listed on their site?

MR. ROBERTSON: Your Honor, this has been asked three times today now.

THE COURT: I think it has.

BY MR. RANDALL:

Q. Would you agree that neither eBay nor Half takes title to the goods that are listed on their site?

A. Yes.

Q. Would you agree that neither eBay or Half [1037] possesses the goods that are listed on their site?

A. Yes.

Q. Would you agree that neither eBay nor Half inspects the goods that are listed on their site?

A. Yes.

Q. Would you agree that neither eBay nor Half vouches for the quality of the goods that are listed on their site?

A. No.

Q. And how do they do that, sir?

A. Because if I were to post something that is illegal: firearms, drugs, then eBay will inspect the descriptions, and if I—let's say that I'm trying to sell a firearm. EBay will notify me that I can't do that, that that's illegal.

Q. There are certain items like illegal items and racially insensitive items that eBay tries to avoid having those listed on their site, right?

A. Yes, that's right.

Q. And that's it? That's the extent of your basis for your opinion that eBay or Half vouches for the quality of the goods; is that right?

A. Well, in addition to that there is also the terms of the user agreement, and there's also the expectation that you see in the feedback forum -

Q. There is—

[1038] A. —that the seller will perform and that the buyer will perform.

Q. There's nothing in the user agreement about eBay vouching for a particular quality of goods on the site, correct?

A. Okay. I think that's right.

Q. All right. You'd agree that neither eBay nor Halfdescribes the goods listed on their site, correct?

A. The descriptions are provided by the posting terminal, yes.

Q. By the sellers right? Not a machine, right?

A. By the seller or the seller's software.

Q. Or the seller or someone else who is doing it for the seller, right?

A. Yes.

Q. All right. Would you agree that neither eBay nor Half—strike that. The seller can enter any description they like under eBay or Half, right?

A. Yes.

Q. And the seller on both eBay and Half ships the goods, right?

A. Yes.

Q. And the seller on eBay and Half owns the personal computers right? Or strike that.

* * * *

[1049] Q. Do you have it now, paragraph 17?

A. Yes, I have.

Q. And you see the Court's construction there. Let me read it you. It says that, Recitation only requires that the posting terminal apparatus is verified as an authorized user of the market apparatus. Do you see that?

A. I do.

Q. Do you recall whether or not that eBay argued to the Court that a unique code was required for each posting terminal?

A. Yes.

Q. Did the Court accept that argument?

A. No.

Q. You were asked some questions about the UCC, do you remember that? The Uniform Commercial Code Commercial Code?

A. Right.

Q. And you indicated you didn't have familiarity with correct?

A. And I still don't.

Q. So you don't know that the UCC applies to custom and trade between commercial merchants, do you?

A. No.

Q. Do you know whether or not there's been any specific finding about the UCC with respect to individuals [1050] who post goods and sell over the Internet?

A. I'm clueless.

Q. And as far as the pages we saw—

MR. ROBERTSON: Could we see H6, please?

BY MR. ROBERTSON:

Q. The first phrase that's not highlighted says "Unless the context otherwise requires." Do you see that?

A. I do.

Q. Are we in a virtual context in the environment we're talking about with eBay?

MR. RANDALL: I'm going to object. I don't know, there's no definition of what—it's vague and ambiguous as to what he's talking about.

THE COURT: Overruled.

A. We said yesterday and again today that the whole context of the Internet is a virtual world. Virtual presentment of goods is the way the patent describes this. So yes, it's a virtual world.

Q. Might be a different context then; is that correct?

A. It might be.

MR. ROBERTSON: How about H5, can we see that one, please?

BY MR. ROBERTSON:

Q. It says "Unless otherwise"—well, let me strike

* * * *

[1080] MR. STILLMAN: Thank you, Your Honor. Our first witness this morning is Michael May.

MICHAEL MAY, a witness called on behalf of the Plaintiff, after having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. STILLMAN:

Q Good morning, sir.
A Good morning.
Q Could you tell the jury and the court your full name?
A Michael Paul Hay, M-A-Y.
Q Where do you live, sir?
A I live 7622 Fairway Drive, Omaha, Nebraska.
Q I'm sorry?
A Omaha, Nebraska.
Q What do you do for a living?
A I am the chairman of a company, ISecureTrac Corporation, which produces tracking systems to be used in criminal justice to track offenders, and I'm also a member and a director of MercExchange.
Q When did you first become involved with MercExchange?
A I first became involved with MercExchange sort of indirectly through involvement with Aden Corporation.
Q And what was your involvement with Aden?
A For a brief period of time, from January of 2000 till [1081] April 1st of 2000, I was vice chairman of Aden.

THE COURT: Excuse me one second. I forgot to ask you all. Were those patents copied?

MR. STILLMAN: Yes, they were.

THE COURT: They need to be given to the—

MR. STILLMAN: Do you want to do it now?

THE COURT: Hight as well. I didn't mean to interrupt you, Mr. Stillman, but I just forgot about it.

MR. STILLMAN: Yes, sir.

THE COURT: Have you seen them?

MR. RANDALL: No.

THE COURT: Those are certified copies?

MR. STILLMAN: I understand you wanted both the '176 and the '265?

THE COURT: That's correct. Do you have one, Hr. Randall? I would think you do.

MR. RANDALL: Yes.

THE COURT: Mr. Stillman, why don't you ask your question again. I'm sorry. I did not mean to interrupt you.

MR. STILLMAN: That's quite all right.

BY MR. STILLMAN:

Q I think I was asking, Hr. Hay, about your initial involvement with Aden. I think you were answering that question.

A Well, I first began discussing joining Aden in the fall [1082] of '99, and that's when I first met Tom Woolston.

THE COURT: Mr. May, would you mind moving that mike a little closer to you.

THE WITNESS: I'm sorry.

THE COURT: There you go.

THE WITNESS: Probably will lean forward, too.

BY MR. STILLMAN:

Q What were the circumstances of you meeting Hr. Woolston?

A Mike Luther was the chairman of Aden and had been recruiting me to join Aden. As part of my due diligence, I wanted to spend time visiting with some of the people that

were key to Aden. And also Tom was in the middle of putting an office in Alexandria where he had a subsidiary called Navlet of Aden that was coming up with some programmers and some activity. I wanted to investigate that.

Q Were you an officer of Aden at the time that MercExchange entered into its first agreement with Aden?

A No. That occurred several months before I arrived.

Q So when you arrived initially on scene, there was already an agreement between MercExchange and Aden: is that right?

A Yeah. There was an agreement between Mere and Aden to utilize MercExchange's intellectual property, there were license agreements in place, and there was some arrangements for stock and other things.

Q Describe for us, if you would, the circumstances whereby [1083] you ultimately became a managing director of MercExchange.

A All right. In the 90 days that I was at Aden, from January through March of 2000, I spent quite a bit of time with Navlet and Tom. I just couldn't work with Hr. Luther. It was just there were several things that weren't happening that we thought should happen.

And so after I left, I stayed in touch with Tom. About 45 days after my departure, sometime in mid-May, Tom called me, said that he had—also had some disagreements with Aden. They weren't fulfilling their contracts, basically. And so I then became involved in helping Tom structure a departure between HercExchange and Aden to sort of unravel the license; and get the intellectual property back in Merc-Exchange's hands. So that started probably mid-May.

Q Mid-May of what year?

A Mid-Hay of 2000.

Q And were you ultimately successful in unraveling the relationship between Aden and MercExchange?

A That occurred. The licences were returned, Aden made a small settlement payment, and MercExchange began to operate as its own business again. And in the middle of all that, I was also helping Tom with some other things that were happening around HercExchange. That was prior to me joining.. I hadn't joined MercExchange.

Q What other things were you helping HercExchange with at [1084] the time?

A Well, Tom was trying to build up a programming staff and an enterprise and putting a business—wanted to put a business together. He also had some discussions with eBay about the patents, and I was involved in one of those meetings and in some of the discussions around that.

Q What role, if any, did you play with respect to advising MercExchange regarding the development of its business plan?

A Well, about probably August of 2000, Tom asked me to become a member of MercExchange.

Q What does that mean, when you say "become a member"?

A Well, MercExchange is an LLC, and so—

Q What is that?

A It's a corporation. But instead of shares in the corporation, they are actually units of ownership. Those owners that have units, or at least in our operating agreement, were called .members. So I was a member, an owner of MercExchange.

Q And what role did you have with respect to the development of any business plan for MercExchange?

A We had recovered from Aden the licenses and also some of the software and technology. And so there were two things that were going on within MercExchange. One, and the principal one, was to try to build a business around those inventions. And I was involved in helping Tom try to sell [1085] basically MercExchange's technology and services to some companies.

We had meetings with Christie's up in New York, we had—there was a travel company in Tampa called IFly, another company. I think it was TigerDirect. There were a few companies like that that we were talking with, and I was involved in that. Also helping him internally to set up project management and some things that were necessary, because he had five or six programmers at that time that there working on things pretty feverishly.

So on the other side we were also trying to develop a licensing program for MercExchange for its intellectual property, principally its patents. And I had had some experience. I had run a software business for several years with a public company, and so I was trying to help put in place the licensing program.

Q Let me ask you to focus for a minute, if you would, on that portion of the business plan wherein MercExchange was trying to develop a business of its own for a moment. Could you describe what MercExchange was about during this time period in terms of developing its own business model?

A Well, it had the patents pending. It had the—what's now called the '265 patent as well.

Q What time frame are we in?

A We are—this would be September, October.

[1086] Q What year?

A Of 2000. The original intent that was -- Tom, I know at Aden, was to build and Aden was going to be the vehicle to basically build an e-commerce system that would allow companies to—or individuals to buy and sell goods over the Internet. And so that was what they were attempting to build.

Q Do you know whether that was intended to be a complete commercialization of Mr. Woolston's patents?

A Well, I mean, I don't think they were writing the software, you know, to mirror only the patents. I mean, it was a broader initiative than that. There were several things going on related to, some things unrelated to that, all part of an

overall attempt to have an enterprise that could be a real company and run that way.

Q How successful was MercExchange in building a business? A Not as successful as they were in building software. It was pretty hard. I think at that time—I mean, I spent some time trying to find companies that were really interested in utilizing MercExchange's facilities.

But honestly, eBay owned a lot of that market already in terms of being able to serve that market. And there were other companies like Yahoo and Amazon trying to break in, and even then there were venture capital-backed companies out in—principally out in California. So there were a lot of people ahead of him.

[1087] Q As a result, did MercExchange eventually abandon its attempts to build a business of its own?

A Well, I came to Tom sometime before Thanksgiving of 2000, and, you know, I said that—you know, it was really my own business judgment, that MercExchange didn't have the resources to both build an enterprise, first of all, and then try to also pursue the licensing. He was running out of money.

To me, it made the most sense to take the assets that I thought MercExchange already had, the patents and the legal rights to some of this technology, and attempt to build a licensing program, because we did have the resources to do that. I recommended that we shut down all of that programming side. It was kind of a bitter pill for Tom, I think, but we gave all those programmers some notice, and by the end of the year they had all been let go.

Q Now, you mentioned that you were involved as an owner and managing director in the development of a licensing program. Could you explain to the jury what a licensing program is?

A Well, the intent was to take the patents, but also some of the technology that—software and things that had been built starting at Aden, and then—through the six months or so, and create an opportunity for other companies to use that by providing them essentially with the license or an agreement to use that in return for either a one-time payment or some payment while they used it. So it would basically give them a [1088] contractual right to use the technology and use the patents.

Q And did you, in fact, attempt to negotiate on behalf of MercExchange any license agreements?

A Yes, we did attempt to do that. I learned that my software experience wasn't an transferable because the patents have some unique aspects to them that make it somewhat challenging, I think.

Q Who specifically did you talk with?

A Well, you know, I mentioned some of the companies that we had made calls on earlier, and those were companies that we also talked to, Christie's and IFly is a travel company. We had had discussions with eBay. I had been involved in those early. And after we made the decision to shut done, we really hadn't had anymore discussions with them. We approached a company Goto, Goto.com. And then actually had some phone calls and some correspondence with Yahoo, with the person there.

Usually what I found is—I'm not an attorney, and I would—with any company of any size or even, the smaller ones, I kept getting pushed over to the legal department, which was something difficult. So that's why I said we weren't necessarily getting a lot of traction.

Q Why weren't you getting traction?

A It seemed to me that the companies that had already started working in an area really didn't want to spend a lot [1089] of time looking at your patents.. If there were legal rights, that's where they said, well, I guess that has to be determined. So it just wasn't a situation where companies

seemed very inclined to want to talk to you. And I had been informed by our attorneys to be very careful in how far I approach somebody, because a lot of times, companies with greater resources would try to act preemptively. They would—I learned a new term, which they said DJ, but—

Q What does that mean?

A Well, as I understand it, what I was cautioned about is approaching a company about our patents and finding that they—out of concern that we might sue them, would actually file a suit against us in the court somewhere. I think I was told that happens a lot with—especially when you are a smaller company and don't necessarily have the resources to go defend yourself at a lot of places. You could get mired down very quickly in places and just, you know, bleed the money out.

Q As a result of some of these early failures to license your patents, did you and MercExchange make a decision about how you needed to go about this licensing program?

A Yeah. It became very clear to me that it's a legal right, but it's only a legal right if you enforce it. And so we made a decision that we would, within the resources that we had, attempt to begin to basically force companies to honor [1090] our patents. And we started with identifying Goto because we were—had had some discussions, were familiar with them, and really felt in the end that we could get them to take a license.

Q Did you eventually also have discussions with a company called AutoTrader.com?

A Eventually we did, yeah.

Q When was that?

A The first discussions with AutoTrader.com really weren't until November of this last year, 2002.

Q And what was the business of AutoTrader.com?

A AutoTrader.com was an affiliate of AutoTrader. Auto-Trader has the little magazines where people advertise, and you can find them in stores and Quik shops and things

like that. And so essentially what AutoTrader.com is, take that concept and put that online. They were working with eBay as the basic company that presented that to the world, to the users.

Q How did AutoTrader.com make money?

A They made money on the listing fees.

Q What does that mean?

A When somebody chose to list with AutoTrader and put it in the magazine or put it online, there was a small fee that was assessed. Like a one ad, I believe, basically how I would relate it. That's my understanding. [1092] marshal to show him Exhibit 731, Plaintiff's Exhibit 731.

THE DEPUTY CLERK: Do you have a volume number?

MR. STILLMAN: Probably do. I have a copy of it. We can do it this way. That might be easier. Maybe you can—give one of those to the court.

BY MR. STILLMAN:

Q Mr. May, I have put in front of you an exhibit that's been premarked as Plaintiff's Exhibit 731. Could you tell the jury what that is?

A It is a license agreement between MercExchange and AutoTrader.com wherein MercExchange is granting a license or a legal right for AutoTrader.com to utilize the MercExchange patents to operate its online listing services.

Q And what did MercExchange receive for this license?

A Well, what we were trying to do with all of our licensing was to have two components. And so we had—in this case we received a one-time nonrefundable license fee for issuing the license of $450,000. And then the second component of that was tied to an ongoing royalty that would be established, but only based upon AutoTrader.com's activity levels. And also I think there was another caveat in there. Basically—yeah. The final stipulation on the royalty itself was that MercExchange had to be successful in

obtaining an injunction against eBay in operating in that motor field or the- automobile listing field.

[1093] Q Why was AutoTrader unwilling to pay you an ongoing royalty absence your ability to obtain an injunction against eBay?

A Well, they were arguing that the value of our patents would be very limited unless eBay either had a license or was enjoined from practicing.

MR. STILLMAN: Your Honor, I offer 731.

THE COURT: All right.

(Plaintiff's Exhibit 731 was received.)

MR. STILLMAN: Mr. May, answer any questions that Hr. Randall may have.

CROSS-EXAMINATION

BY MR. RANDALL:

Q Mr. May, how much of the settlement that Goto.com paid MercExchange was attributable to, if you know, Goto's desire not to continue paying a team of lawyers to litigate the case and ultimately try the case?

A I wouldn't really know. I really wouldn't know that. I mean, we were pretty—actually, we were pretty close to going to trial, so I assume they had already spent a lot of that money.

Q How long had that litigation been going on, sir?

A Since—we would have filed that in 2000. Fall, October. I don't know the exact starting date. I believe the settlement was in June and the trial was scheduled, I think, [1094] for July.

Q MercExchange settled the Goto.com litigation before the court ruled on whether or not the '176 patent was invalid in light of Dr. Keller's prior art that he had submitted in a declaration, correct?

A If you say so, I guess. I mean, I don't know.

Q You don't know that?

A No.

Q You were part of MercExchange at the time, were you not?

A Yes.

Q And you don't know that MercExchange settled on the eve of -- before the court ever considered whether the patent was invalid based on that evidence that was submitted to the court?

A Well, I know that we were set for a trial to determine infringement and validity. I don't know about—was it Dr. Keller or Mr. Keller?

Q Dr. Keller. You didn't know that there was a pending motion for summary judgment, that the '176 patent, the only patent in that lawsuit, was invalid in light of Dr. Keller's prior art?

A There were a lot of motions, so no, I didn't know that specifically.

Q How many lawyers would it have taken Goto.com to assemble a team and come to Norfolk and try that case, and how much [1095] would that cost, sir?

MR. STILLMAN: I'm sorry. That's not a fair question.

THE COURT: Sustained.

BY MR. RANDALL:

Q You have no idea, do you not, sir, about whether Goto.com settled that case to just avoid the additional expense of the. trial?

A My belief is they settled it because they believed that they infringed.

Q Do you know—strike that. Do you agree that the AutoTrader license doesn't have anything to do with fixed price sales, correct?

A I'm not sure I understand the question. I'm sorry. Let me try to understand. Try it again.

Q The AutoTrader license addresses royalties only for AutoTrader's auction format, correct?

A As opposed to?

Q As opposed to their fixed price sales.

A I see what you are saying. I'm sorry.

Q The AutoTrader license—

A Yeah.

Q —addresses royalties only for AutoTrader's auction format, right?

A Yes.

[1096] Q And this case does not involve auctions, correct?

A Our case?

Q That's right.

A My understanding is that the auction part of that has been excluded from this trial, yes.

Q And did MercExchange tell AutoTrader that when it received the money and when AutoTrader executed this license, that MercExchange would not be able to enjoin eBay's auction of cars?

A We didn't tell them we'd be able to enjoin anything about eBay. We had no reason to represent we didn't enjoin eBay on anything.

Q. Did you tell AutoTrader, before they executed this license, that this case only involved fixed price sales and not the auction format that is the subject of their license?

A Well, no, I did not represent that to AutoTrader. What we did is provided them with all of the court material that was available to provide them with. Provide them with our patents and, you know, let them decide for themselves what the implications were. I certainly didn't represent to them that we didn't enjoin or do anything else.

Q According to the AutoTrader license, AutoTrader is only required to pay royalties, number one, if they agree, right; because they have an opt-out clause, which means that they can at any time say they don't have to go forward with the

* * * *

[1098] A Okay.

Q Is that about right?

A I can do the math, but I'm sure.

Q And how many cars do they sell today?

A I don't know how many cars they sell today.

Q 450, does that sound about right?

MR. STILLMAN: I think he just said he doesn't know, and now Mr. Randall is testifying.

THE COURT: Do you know?

THE WITNESS: No, I don't know.

THE COURT: Okay. Next question.

BY MR. RANDALL:

Q You talked a little bit about why you joined MercExchange and you had done some due diligence; is that right?

A Well, that was—the due diligence I was doing was really on Aden Enterprises, not so much on MercExchange at the time.

Q You talked about the limited resources that MercExchange had when it decided to stop this effort about starting a business, right?

A Right.

Q You were on MercExchange Board of Directors in October of 2000, correct?

A Yes.

Q And at that time MercExchange valued itself, including [1099] all of its patents, at $50,000, correct?

A I don't know that that's correct. I mean, for some purposes we did, yeah.

MR. RANDALL: Would you pull up Defense Exhibit 405, please?

THE WITNESS: Okay. Yes. Reflected book value for the assets, yes.

MR. RANDALL: Go to the first page of that. Why -don't we go to Resolution number 5; Blow that up.

BY MR. RANDALL:

Q In Defense Exhibit 405, I'm showing you what's Resolution number 5. Can you blow that up, Mr. Davis? Does this refresh your recollection that, in fact, in October of 2000, through a resolution of the board at MercExchange, that the board set the value of the entire company at $50,000?

A Well, as the resolution says, that was for purposes of valuing the new units so that we had a basis to declare the value of those units and pay taxes or whatever on it. That's, you know, from—I'm not a professional appraiser, but the experience that I had is that, as it says here, there is a book value for the assets which is one thing.

And then we have also—if you are talking about the units, they aren't as valuable because you can't buy and sell them like you could a share of stock or something else. So typically you would value those for purposes of the award [1100] of units. You value that at a lower value than you would if you could freely trade them. So we were trying to arrive at a value, at least, because we had to declare something for purposes of the award of units.

Q Well, the $50,000 that MercExchange agreed to set the value at was for tax purposes, so that you all knew how much you could report on your taxes, about how much stock you owned, and the value of that stock, right?

A Well, it was to establish a basis for the ownership so that at a point in time, you know, you could look at that and say it's either increased or decreased.

Q But establishing the basis means that you established a cost—a price of that company at that time for tax reporting purposes, correct?

A Sure. Correct.

Q No doubt about that, right?

A Right.

Q And so you all would report for tax purposes that the entire company, including all the patents, was worth $50,000, right, in October of 2000?

A You are going to have to go to our accounting records and see what they put in. I mean, this doesn't relate directly to the books of the company. This relates to the value that the owners that were awarded units were put on those awards so that we—because that's compensation.

[1001] Q For tax purposes, right?

A Yes. Yes.

Q And you were on the board in October of 2000. You voted for this, didn't you?

A Yes, I did.

Q And you agreed at that time that, to the best of your knowledge, the entire company was worth $50,000, right?

A Yes.

Q And so did Mr. Phillips and so did Mr. Woolston, they both voted on this, right?

A Yes.

Q And the other purpose for this valuation of $50,000 was to so that you and Mr. Phillips and Mr. Woolston could buy out the ownership interest of your employees, correct?

A No. I don't believe that—I'd have to go back and honestly see if this resolution is directed to that. I don't know that that was really the case.

MR. RANDALL: Go to the last page.

BY MR. RANDALL:

Q This is the last page.

MR. RANDALL: By the way, Your Honor, I move Exhibit 405 into evidence.

THE COURT: 405 is admitted.

MR. STILLMAN: I can't see because my page is cut off in the pretrial order. I don't know what—

[1102] THE COURT: It's okay.

(Defendants' Exhibit 405 was received.)

BY MR. RANDALL:

Q This is the end of Exhibit 405, which was a resolution by MercExchange, and it is signed by the three MercExchange board members that were present at the meeting, correct?

A Yes.

Q And the signatures are as follows: Tom Woolston, Michael May, and John Phillips, correct?

A Right.

Q And you all agreed, did you not—and can you blow that language up? It says, "The undersigned managers waive the requirements of Notice of Meeting as required to hold a meeting of the MercExchange Board of Managers for the meeting being held October 15, 2000." Do you see that?

A Uh-huh. Yeah.

Q What other individuals were members of the board at that time?

A I think that would be—we'd be the only members of the board at that time, board managers.

Q Let me direct your attention to Exhibit 404. Can you pull it up? Do you recognize this, sir, as—if you can blow up the first paragraph of that—as minutes of a meeting of the Board of Managers of MercExchange? And this board meeting was held on June 14, 2001. Do you see that?

[1103]A Yes.

Q You were a member of the board at that time, correct?

A Yes.

Q And so was Mr. Woolston, Mr. Phillips, correct?

A Yes.

Q And this document memorializes what happened t that boarding meeting, correct?

A Yes.

MR. RANDALL: Your Honor, I would move Exhibit 404 into evidence.

THE COURT: 404 is admitted.

(Defendants' Exhibit 404 was received.):

BY MR. RANDALL:

Q Who else was a member of the board at that time?

A I think we were the only members of the board managers

Q Now, is this about the time, June of 2001, that MercExchange decided to redirect its efforts from trying to build a business to licensing?

A No. This was some months after that.

Q After this date, did MercExchange ever attempt to resurrect this effort to build a business?

A After the 2001 date?

Q Yes.

A No.

Q And when you talked on direct about MercExchange's [1104] attempts to kind of 'build this business, you are not aware of any attempts on behalf of MercExchange to build a business between 1995 and 2000, correct?

A Would you repeat that?

Q Your testimony was that sometime in 2000 there was some effort by MercExchange to build this business and create software, right?

A Well, I believe my testimony was that they were continuing an effort that had started in '80 (sic). So yeah, there was an effort going on, but that effort had begun in 1999.

Q And, I'm sorry, if I forgot. Were there any other board members at this time in June of 2001?

A I don't believe so, no.

Q this board meeting—and I direct your attention to the fourth paragraph down where it says, "The first order of business. The first order of business was to review and approval of Resolution 1, ratifying the company's agreement to settle its litigation with Goto.com," correct?

A Yes.

Q That settlement had already occurred by the time you had this meeting, correct?

A Yes.

Q And so the board was basically approving something that Mr. Woolston had done already, correct?

[1105] A Ratifying it, yes.

Q. Means approving?

A Approving.

Q Right.

A After the fact.

Q Right. The next paragraph states, "A motion was made to approve Resolution 2, authorizing the company to further investigate, and if deemed necessary, to initiate legal action against Auction Watch for infringement of the '176 patent." Do you see that?

A Yes.

Q It was passed by unanimous vote, correct?

A Yes.

Q So at that time you wanted to sue Auction Watch, right?

A We wanted to determine if it made sense to sue Auction Watch.

Q Would you scroll down to about the middle of—this paragraph that we see here, where it starts—the paragraph starts, "Mr. Woolston presented a summary of the proposed budget for the company for the remainder of the calendar year." Do you see that?

A Yes.

MR. RANDALL: Can you blow up from starting in the middle of that subparagraph where it says, Each nonemployee manager? Just go all the way down. There you go.

* * * *

[1107] salaried officers and employees, shall be eligible to receive bonuses. These bonuses, if any, are to be tied to the success of the company in its licensing activities." Do you see that?

A Yes, I do.

Q And that means that if you are successful in litigation against eBay or whomever else for licensing, you all get a cut of the pie, right?

A Yes.

Q And in this instance, based on the Goto.com settlement, Mr. Woolston received $2.1 million to take home, correct?

A Well, that was what we agreed to pay. I don't know that it was actually distributed that way.

Q You don't know if that was distributed?

A Not in that manner I don't think it was.

Q You don't think so?

A But that was our intent certainly at the time of this meeting to do that.

Q So your intent at this meeting was, based on the Goto.com settlement, was to pay you $250,000, pay Mr. Phillips $250,000, and pay Mr. Woolston $2.1 million, correct?

A Correct.

Q And, in fact, other former members of the company, Mr. Bartlam and Mr. Matney, accused Mr. Woolston of fraud and accused you and Mr. Phillips of breaching their fiduciary duties in arriving at these resolutions, correct?

* * * *

[1109] BY MR. RANDALL:

Q At that same meeting—and this is all in June of 2001, right?

A Yes.

Q At that same meeting, and I'm reading from your resolution, "A motion was made to approve Resolution 4 authorizing the president"—that's Mr. Woolston, right?

A Uh-huh.

Q —"to negotiate an engagement with outside counsel for the purpose of beginning enforcement proceedings against eBay for infringement of the company's patents." And that was unanimously approved, correct?

A Correct.

Q Next paragraph down it states, "There was a discussion of the status of the employee unit members who were no longer in the employ of the company. It was agreed that the company's policy will be to consider bonuses only to active employees of the company, and that the company did not contemplate any general distributions to members of the employee unit class." Do you see that?

A Yes.

Q Now, the employee unit class were all those individuals who had worked for MercExchange while MercExchange was trying to development something, but no longer worked for them because of your switching plans, correct?

[1110] A Correct.

Q And those former employees all had ownership interest in stock, right?

A Yes. That would be what was called here the employee unit.

Q Right. And so these former employees who had received stock in the company, this resolution means that you were going to pay them nothing out of that Goto.com settlement, right?

A I think that's correct, yes.

Q And further down it states, "It was determined that it would be in the best interests of the company to attempt to negotiate a repurchase of the employee units held by all terminated employees, and to attempt to maintain an adequate reserve." Do you see that?

A Yes.

Q That means that you weren't—you were going to try at that time to buy out these former employees' stock, right?

A Yeah. There was a provision when they were granted those units for buying out those units.

Q And you wanted to buy them out before you sued eBay, right?

A Well, we wanted to buy them out because they weren't a continuing part of the business. No matter what we did in going forward, they weren't going to be active in the [1111] business. So that's why the provision was granted in the first place.

Q And at that time the valuation of the company, at least as far as these employees knew, was $50,000, right? A I don't know that they knew that at that time. I don't know we knew that. I think that was a different—you might have to go back. I thought that was in October.

Q You were on the board at this time, right?

A I thought you showed me that it was October 2000.

Q I know I showed you that document. I'm asking you about this time. Were you on the board in June of 2000?

A That's correct.

Q I'm sorry, 2001. In June of 2001 you were on the board, right?

A Yes.

Q And the board at that time valued the company at $50,000 as well, correct?

A I don't know that that's correct. If it's in the minutes, then that's what we decided.

Q If I have a document that's in writing, you would agree to it?

A Well, yeah, I guess I would. Sure.

Q Further down it says, "It was further determined that the president should be authorized to negotiate the repurchase of the Class A units and retire members Bartlam and Matney." Do [1112] you see that?

A Yes, I do.

Q And that means that you and Mr. Phillips and Woolston all agreed that you would try to buy out the interests of Bartlam and Matney, right?

A Correct.

Q And they were friends of Mr. Woolston, right?

A I don't know. I didn't know that relationship.

Q You have no idea?

A That they were friends?

Q Yeah.

A Mr. Woolston had granted them their units because they were performing services, I believe, in 1995 and '96 for MercExchange. My understanding is Mr. Bartlam was supposed to have provided financing through his contacts for MercExchange, which he ever did, and Mr. Matney was to complete patent prosecution, which he never completed. That's my understanding. So whether they had a friendship or not, I don't know. But they did not receive units for friendship. They received units supposedly for services, and those services hadn't been performed in several years.

Q At the time of this board meeting in June of 2001, the only board members that were present or that could vote on this deal was you, Mr. Woolston, and Mr. Phillips?

A Right. As members of the board, that's correct, yes.

[1113] Q If you would go to the last page of this document. MR. RANDALL: No further questions of this witness at this time.

THE COURT: Mr. Stillman.

MR. STILLMAN: Just a couple.

REDIRECT EXAMINATION

BY MR. STILLMAN:

Q Mr. May, you were asked some questions about the distribution of fees, director fees to you and to Mr. Phillips and Mr. Woolston. Do you recall those questions?

A Yes, I do.

Q And as I recall, you received $250,000 and Mr. Phillips received $250,000 and Mr. Woolston received $2.5 million; is that right?

A 2—well, that document said 2.1.

Q 2.1. And that was essentially the company's resolution regarding the payout of the Goto.com settlement agreement, was it not?

A Correct.

MR. RANDALL: I'm going to object to leading. I don't mind him answering the questions, but they are leading.

BY MR. STILLMAN:

Q What was that? What was the payment of 250, 250, and 2.1 to Mr. Woolston representing?

A When we made the decision that MercExchange needed to

* * * *

[1115] A At the time that we settled this?

Q Was there a—

A Are you referencing the resolution of the board or when they first parted company?

Q At any time.

A There was a lot of loose ends.

Q. Was there eventually a resolution—

A Yes, there was a resolution.

Q Let me get my question on the record. Was there eventually a resolution of any rights Mr. Bartlam and Mr.

Matney might have regarding their employment status with MercExchange?

A Absolutely. We sat down with them and resolved that, and as far as I know, they are happy now.

MR. STILLMAN: Thank you very much.

RECROSS EXAMINATION

BY MR. RANDALL:

Q The resolution was with respect to a dispute that MercExchange had and its former founders, Bartlam and Matney, about how those Goto.com settlement funds were distributed, correct?

A I think it was broader than that. I think it had to do with dilution of their ownership rights.

Q Dilution of their ownership rights, because they alleged and they accused you and Mr. Woolston and Mr. Phillips of [1116] issuing these shares, among other people, you and Mr. Phillips, correct?

A That's correct.

Q So they were angry that Mr. Woolston had issued shares to you and to Mr. Phillips that would then dilute their interest, right?

A They were—remember, they were no longer active. They hadn't been active for years, and they got their units the-same way we got ours. They got theirs for services.

Q You hadn't contributed any money, though, right?

A -They didn't either.

Q And another reason why this dispute arose was - because they believed that you and Mr. Phillips had breached the fiduciary duties and Mr. Woolston committed fraud in this board meeting in June, in deciding how to split up this money-and giving you three $2.6 million, correct?

MR. STILLMAN: Asked and answered. That was all covered in cross-examination.

THE WITNESS: Well, first of all, I don't—THE COURT: Wait a minute. Wait a minute.

THE WITNESS: Sorry.

THE COURT: I think it was covered in cross.

Objection sustained.

BY MR. RANDALL:

Q When Mr. Stillman asked you about the dispute being [1117] resolved, MercExchange hired lawyers, Bartlam and Matney hired lawyers, and ultimately the whole thing was resolved partly based on the fact that Bartlam and Matney would receive a portion of any recovery against eBay in this case, correct?

A That was one of the elements of it, yes.

Q And you stand to gain a percentage of any recovery against eBay in that case, too?

A Absolutely. That's how MercExchange generates its revenue, by licensing its patents.

MR. RANDALL: No further questions.

THE COURT: Is that it?

MR. STILLMAN: May Mr. May be excused?

THE COURT: He may, yes, sir. Thank you. (Witness excused.)

THE COURT: Next.

MR. STILLMAN: Your Honor, our next witness is by video, a Ms. Inna Vogel, an eBay engineer, and a designated witness on behalf of eBay as to the process used to list items for sale on the eBay Web site.

THE COURT: All right.

MR. STILLMAN: Your Honor, this witness will take about 45 minutes. And I think there is a brief stopping point in the

middle, but I believe we have corrected the problem with respect to this that we talked about earlier.

(The videotaped deposition of Inna Vogel was played

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[1203] in the report, but I think it was '97. So some of, there may have been a period of time when they were in 705, there may have been a period when they weren't in 705. But that's generally the case as to the dates.

With regard to the business method initiative, yes, I set up a business method initiative around the year 2000. March, I believe, of 2000.

Q. And that Business Method Patent Initiative was instituted as a result of criticism that the Patent Office had received, whether you agree with that or not, in handling patents in these, in class 705, correct?

A. There were several things that led us to come up with the Business Method Initiative. In the late '90s there started to be a rise in the number of applications that dealt with the Internet, that dealt with financial services. A commissioned a white paper look back at the history of the office. We had been issuing patent on sort of business methods, like accounting methods or statistical record keeping methods for 150 years. But in the '80s and more importantly into the '90s, particularly with the rise of the Internet, there came to be an increase in the number of applications.

Also, maybe because of the nature of the Internet and folks that were on it, they were new to the patent system and they raised a lot of questions about it, and they [1204] were concerned about what this meant for their work. And so they made these questions fairly publicly known.

Also, as I said, there was—well, actually there was another factor that came into place. There's an appeals court that hears all of the appeals of these cases from the district court

level. And they had issued an opinion which sort of, once and for all, said that software is patentable and business methods were patentable. And there had been some question with that before. Once that happened this increase really started to go up. So because of this increase and because of this sort of public discussion, let's call it, the political aspect of it—I was a political appointee, I had to take care of my politics too—we wanted to make sure we were doing things right. So we implemented the so-called Business Method Initiative. And very successfully.

Q. And part of the reason for that was that the Patent Office had been criticized for its issuance of patents in the 705 class, correct?

A. I'd like to call it public discussion. I think that the criticism was not well-founded. But sometimes you want to make sure you're taking care of business, you know?

Q Okay. A key feature of this Business Method Patent Initiative was that it called for a number of enhancements in the Patent Office application examination [1205] process intended to ensure the quality of patents issuing from class 705, correct?

A. Yes. And in particular, as I said, because the number of applications was rising so rapidly, we needed to bring new examiners in. And we have new examiners, you've got to make sure that they're being overseen in a good way, that the supervise, that there's supervision to make sure that these patents are appropriately issued. And so one key factor in the Business Method Initiative was to have what's called Second Look, or what's called the, second-level review.

Q. And also one of the enhancements other than the second-level review was the mandatory prior art searching which would include non-patent publications, correct?

A. That's actually the mandatory computerized search. Most—that was a little bit of a sleeves-out-of-your-vest. Almost all of the examiners, particularly in this art unit, would use the electronic search tools. We were negotiating

with unions at the time whether they had to use that or not, and we wanted to kind of slip that in, if you will, and wanted to make sure that they did use those electronic tools. They also have the paper tools, the libraries, the search room, all that stuff too.

Q. Well, if everybody was, in fact—everybody in the Patent Office was, in fact, using the computers to [1206] search for prior art, then there would be no reason in the second look policy to include the mandatory requirement to do computer searches, right?

A. It's a longish question. I think the need to get mandatory searching in—and this was a bit of a pilot program or a test case, because a number of the search tools—at that point we had a brand new search system, known as EastWest, and we wanted to make sure the examiners were using it. And the examiner's union resisted it a little bit, so we were kind of using this as a pilot program, I guess I should say.

Q. This second look policy was actually a, the initiative required applications in class 705 to receive a second-level review by a senior examiner before being issued its patent; is that right?

A. Yeah. As I said, because the class had grown so rapidly, the number of applications, we wanted to make sure we had enough eyes looking at these applications. This was in 2000, so this was several years after this rise occurred. Several years after the applications we've been talking about today. But it was important to make sure that we had those looked at carefully. They are done by an examiner that has a title called QAS, which stands for Quality Assurance Specialist, yes.

Q. So the answer to my question is yes?

[1207] A. Yes.

Q. The purpose of this second-level review is to ensure compliance with the mandatory prior art search requirements and to verify the clarity and completeness of, the reason stated for the allowance and to determine whether the scope

of the patent claims that would be issued should be reconsidered, correct?

A. That's generally a good statement of it, yeah.

Q. And the added scrutiny given to these applications in class 705 affected the allowance rate fox patent applications in that technical class, correct?

A. Indeed it did. I think what happened was that again, this is in mid 2000—the allowance rate went even—well, the overall allowance rate in the office is around 67 percent. Two-thirds of applications eventually issue. Eventually issue. The class 705 allowance rate was around 57 percent before the initiative, and afterwards it went down even further.

Q. Well, when you say it went down a little further, after the implementation of the second look policy that we have been discussing, the allowance rate for applications in class 705 went from 57 percent down to 36 percent, right?

A. That's right. And it rose. Within a year it rose to 57 percent, 45 percent.

Q. Excuse me, I'm sorry, I didn't have a question [1208] pending.

A. Yeah.

Q. During the time that you were with the Patent. Office, you're aware that the average examiner spent approximately 18 hours examining a patent application during the time it was before the examiner, correct?

A. That's the average across all technologies, that'-s how much time is spent, right.

Q. And with respect to applications filed in class 705, after the implementation of the second look policy, an examiner typically spent 31 hours examining the application; is that right?

A. No, that's not correct.

Q. With respect to—

A. Maybe to clarify it for" you, the second-look had no impact on that examination time. That's the time that the—there's an allocation system in the office where there's a very

careful review of classifications, and one classification will get this amount of time; another classification will get that amount-of time. It's also the function of the experience level of examiners.' The more sophisticated technologies, the more challenging technologies get more time. It's not a matter of the second level of review. My understanding is that they had around 31 to 35 hours. As much as. I think it's the highest in [1209] the office in class 705 both before and after the Business Method Initiative was implemented.

Q. One of the conclusions that you've drawn from the statistics that we just went through is that those statistics are reflective of an enhanced level of quality of the patents that have issued from class 705 since the March 2000 second look policy was initiated, correct?

A. Hm-hmm.

Q. Is that a yes?

A. Yes, it is.

Q. Now, the '265 patent—strike that.

The 265 patent issued before the Patent Office adopted business method, this second look policy, correct?

A. Well, that's a good question. One of them did indeed. I don't remember which one had the earlier date. Maybe you can help me out. One of them was issued after the second-level review—the Business Method Initiative went into effect.

Q. The '265 patent issued December of '98. I could give you a copy of that if that refreshes your recollection about—

A. Yes. That would be fine. That would be before the March 2000 date. It's actually March 31st, 2000 when the Business Method Initiative was implemented.

Q. So even though the '265 patent was examined in the [1210] 705 class, it did not receive the benefit of this added scrutiny to ensure the added level of quality that this second policy implemented, right? Second-look policy implemented?

A. As I said, the second-look policy had several goals. One was to make sure that new-examiners who were re-

freshed to the group were getting, your being scrutinized carefully enough. I don't know whether this was before an experienced examiner or a brand new examiner or not. It did not go through the Business Method Initiative. It didn't have the second-level review, that's correct.

Q. And with respect—

A. We have another quality control process in the office. It may have passed through- that, I don't know.

Q. With respect to the '176 patent,' you're not aware of any evidence in the file history that it ever went through the second-level review, correct?

A. Is that the earlier date that we're talking about?

Q. This is the second patent. The '176 patent.

A. Let me take a look at it to make sure I'm clear on it. Hold on just a second.

Could you ask your question again? I'm sorry.

Q. Sure. You're not aware-of any evidence in the file history that the '176 patent ever went through the second-level review, correct?

[1211] A. There was, we made an attempt to make sure that every patent application that was pending on March 31st of 2000, as this one was, was subjected to the second-level review or subjected to the Business Method Initiative. I reviewed the file wrapper and I couldn't tell whether it was or wasn't. The corps made every effort, the patent examining corps made every effort to bring it all in. I can't tell you whether it did or didn't. Probably doesn't matter much, this is a . . .

Q. The question simply was you're not aware of—

A. That's correct.

Q. —anything in the file history that indicates to you that the '176 patent went through the second-look review, correct?

A. That's correct.

Q. Are you aware of the statistics that indicate that nearly half, actually 46 percent of the patents that are litigated to final judgment are invalidated?

A. Not particularly aware of that statistic. I think generally I am. I think that's generally a function of a lot of different things. Usually only fight about the ones that are commercially important.

Q. But that's not inconsistent with your view of the stats, right?

A. It's not.

[1290] A $250 an hour.

Q And you reviewed the Markman order in this case, correct?

A Yes, I did.

Q And you agree with everything that's contained in it, correct?

A That's what the court has decided, yes.

Q Well, I'm just asking.

A I can agree with everything that's in there.

Q Thank you. You mentioned that the end of 1994, on the Internet buyers and sellers didn't trust each other. Isn't that what you said?

A I said that characteristic in the 1994 time frame is that there was certainly concern about security and trust using the Internet between buyers and sellers, yes.

Q All right. Now, this just wasn't your opinion, right? This was a prevailing view at the time, that buyers and sellers wouldn't trust each other in buying and selling goods on the Internet, correct?

A I think that's fair to say, that there was certainly significant security concerns, yes.

Q And also the prevailing view in early 1995 was that buyers and sellers would not complete transactions among themselves on the Internet, correct?

A I think that's fair, yes.

Q And so if you were going to start a business in early

* * * *

[1292] Q Let's just say the—

A The '265?

Q The '265 and the '176 patents have the exact same detail description of the invention, right?

A Right.

Q Okay. There is just a slight pagination difference by a few lines, right?

A I believe that's right, yes.

Q Okay. So that's the patent I'm talking about. We'll call it '265 on that.

A Okay.

Q You have read that, right?

A Yes.

Q And what did Mr. Woolston say his trusted network was in his patent?

A I'm sorry?

Q What did Mr. Woolston say his trusted network was?

A Well, the patent doesn't describe just a single invention. It describes several things.

Q Well, you have testified what you think a trusted network is. I'm asking you what Mr. Woolston said was a trusted network in his patent?

A He talked about a number of ways that this invention could be implemented, and certainly there are comments throughout the specification that talk to elements of the [1293] developing trust. So would you like me to talk more about those?

Q I'd like you to answer my question. What did Mr. Woolston say his trusted network was in his patent?

A He talked about a number of elements. So I'm happy to try and build those elements out, okay?

Q Just answer my question the best you can. That's all I'm asking.

A Okay. The trusted network was one in which there was accurate information and posting of goods and the description of those goods. A trusted network was one in which both market maker computers, consignment nodes,

individual user, participant terminals could share information the posting of goods, the bidding of goods, the ability to find information and categories with a network that was trusted for several reasons. One is that the information was accurate; that there were players on this system who would build reputation; that there were elements that had security and authentication so that players knew that the people who were playing on this system were bona fide. There were opportunities for players on the system to provide verification and authentication of goods. There was a description of the compilation of historical information to providing that as a trusted source [1294] of information about where the goods were and what the prices were historically for those goods. There was information about enforcement and policing the network. In fact, I think we seen several of those elements of both agreeing to be bound by appropriate actions and laws that we saw the—

THE COURT: Doctor, would you move your mike a little closer?

THE WITNESS: Sorry. Thank you. That we had enforcement capabilities, that people would be policed, that we could take bad actors off of the system. We see the technical issues of having identifiers, user IDs, passwords, authentication routines so we knew who the users—that they were the appropriate users. And had also these intermediaries of providing both information, in some cases even escrowing through a trusted agent, and handling the transaction. So I think we see all of those elements in the '265.

BY MR. RANDALL:

Q Before you came here to court today and testified to this jury about what you thought a trusted network was, you read Mr. Woolston's patent to find out what he thought a trusted network was, right?

A Yes.

Q And you took that into consideration, right?

A Yes.

Q And you also read his business plan about what he says a

* * * *

[1296] Q Okay. And what he described in his patent for this trusted network was a consignment node operator who would take physical possession of the goods that he would post on the network, right?

A No, I don't think that's correct. I think that's one of the instantiations, but I don't think that's what's described in the patent solely.

Q Did Mr. Woolston describe in his patent that this consignment node user would take physical possession of the goods, yes or no?

A There is a description in the specifications that suggest this is one way that the system could operate, yes.

Q Does it suggest it or does it actually say it?

A It suggests that it's one of four, at least, different ways that this could operate.

Q And Mr. Woolston describes in his '265 patent that only this trusted intermediary, this vetted bailee or franchisee would be allowed to put the goods on the network, right, post them to the network?

A No, that's not correct either, I don't believe.

Q He doesn't describe that in his patent?

A He describes that as one possibility, but he also describes the opportunity to post through an individual—having individuals post directly, not always through this consignment node.

[1297] Q Does Mr. Woolston in his patent describe the process by which this trusted intermediary completes this transaction between buyers and sellers?

A That once the agreement is made that there is a sale, if you will, completing the transaction piece or from the beginning?

Q Right.

A Yeah, he does describe—

Q And he describes—I'm sorry.

A —ways that in fact this can be completed, right.

Q And he describes it in his patent as a finality of transaction, right?

A I think he certainly uses that word as a possibility, right.

Q And what Mr. Woolston describes in his patent as the finality of transactions based on what he describes this trusted network to do, right?

A That one of the potential ways the trust is built here is, in fact, that it can get to this finality of transaction, yes.

Q Does Mr. Woolston describe in his patent that this consignment node or store has the participant's credit card numbers, and that when a buyer says they want to buy something, that Mr. Woolston's trusted network automatically charges that buyer for the good and transfers ownership of [1298] that good, and then at least gives the buyer the option whether to keep the good at the store or ship it to the buyer?

A I'm sorry. I have lost the process. I'm sorry.

Q Does Mr. Woolston describe in his patent how a trusted network would automatically charge a buyer for a good when the buyer says they want to buy it?

A I don't know. I'm happy to look at the patent to make sure. I'm just not sure.

Q Okay. Does Mr. Woolston describe his trusted network in his patent as automatically transferring ownership of the good when the system has charged that buyer's credit card?

A It is one of the ways that he describes having this happen, yes.

Q You mentioned in your testimony that a trusted network needed to have a set of agreements to set the expectations, right?

A I said that certainly agreement is one of the elements that could be in place for a trusted network, yes.

Q It may or may not?

A Well, I think the question of developing trust in a network I think is a difficult one to get your arms around, that there are different elements perhaps that build trust. But certainly the statement of agreement, the statement of expectations on behavior is an important component for building trust.

* * * *

[1300] A Well, I think—remember, there are individuals that can play within this trusted network. Now, are they individually trusted networks? I don't think they are individually trusted networks. But the network itself is trusted because we have players that are—have agreed to some standards of conduct, that understand that there is some enforceability of those standards, that they have anticipated that there is some intermediary activity, and that there is some technical architecture that suggests that there is a level of security.

Q Well, can you articulate just a set of requirements that are required to be a trusted network within Mr. Woolston's invention?

A I guess my hesitancy here is I'm not sure that a network within the larger network or is it what it takes to be a consignment node within a network or —

Q Sir, you gave an opinion to this jury that eBay is a trusted network within the meaning of Mr. Woolston's patent, did you not?

A I did.

Q I'm asking you can you articulate a set of requirements so that this jury can understand whether someone is a trusted network or someone is not a trusted network? Can you articulate that for us?

A I don't think that the issue is cut and dry. I think it is a situation where you have got multiple pieces to the [1301] invention in the '265, '176 patents. So I think what you are

asking me to do is identify a single instantiation.

Q You can answer the question any way you like.

A Okay. That I don't believe there is a single instantiation, but I believe that trust has typically some of these elements that I have talked about before; that there is information provision; that there is agreement about some common standards; that there are activities undertaken of the network to police it, if you will, to provide some enforcement activity for people who are not abiding by the rules; that the trusted network has to have some degree of technical capability that make it secure, that make it responsive, if you will, to folks within that; and that it can provide intermediation of the variety of processes. In an electronic market context, that typically is a commercial transaction so it might provide the ability to pay through a trusted intermediary, to provide escrows, to provide authentication.

I believe much of what I talked about in the movie presentation are really the kind of things that we also see in the '265 patent that describes the elements that build this trusted network.

Q Mr. Woolston did not invent the concept of trust between a buyer and seller, right?

A He did not.

Q Mr. Woolston did not invent networks, right?

* * * *

[1353] fact, all of the participants in the network had used those key elements, that it would have made the database consistent across the participants in the network.

Q. You testified on your direct examination about your understanding of eBay, correct?

A. In general terms, yes.

Q. All right. And you've studied eBay for some time, correct?

A. Yes.

Q. About a year ago, after studying eBay, you made a number of observations in a declaration that you filed in April 25, 2002, correct?

A. Probably, yes.

Q. You observed in that—based on your study of eBay, you observed that in January of 1998 Media Metrix, the leading web audience measurement company, announced that eBay had become one of the top five most-visited shopping sites on the entire Internet with nearly 1 million unique visitors each month, and the only online auction site to make the top five, correct?

A. I believe that's one of the paragraphs, yes.

Q. And that was a true statement, correct?

A. As I understand it, yes.

Q. You also observed that in 1999, eBay, won the Tenagra Award for Internet marketing excellence in the [1354] category of the most successful Internet business, model in, connection with eBay's use of the Internet to pioneer a business model that provided for the efficient, one-on-one" trading in an auction format, correct?

A. I think that's quoting the Tenagra, yes.

Q. That's a true statement, right?

A. From Tenagrau, yes.

Q. You also concluded that in 1999, Red Herring Magazine, one of the leading publications in the Internet industry, named eBay to its list of the top 100 companies for electronic economy, correct?

A. I think that's correct, yes.

Q. That's a true statement, right?

A. I believe so.

Q. Are you also concluded, based on your review and study of eBay, that in April 2000, eBay received an e-business award from MIT's Sloan School as one of seven leading-edge e-commerce organizations. EBay was awarded the Global Reach Award for successfully leveraging the Internet as a channel for extending global reach, correct?

A. I believe that's that paragraph, yes.

Q. And that's a true statement, correct?

A. As I understand it, yes.

Q. You also observed that on June 16, 2000, eBay announced its receipt of one of the 2000 Computer World [1355] Smithsonian Awards in the business and related services category. In addition to receiving the award materials relating to eBay—strike that. Materials related to eBay were to be added to the permanent research collection at the Smithsonian's National Museum of American History, correct?

A. Yes, I believe that is correct.

Q. That's a true statement, correct?

A. As I understand it, yes.

Q. You also concluded that the auctions listed on eBay in 1996 were 289,000. By the end—strike that.

By the second quarter of '99, they had grown to 29,400,000, correct?

A. That's my understanding.

Q. That's a true statement, right?

A. As far as I can tell, yes.

Q. Furthermore, you concluded by December of 1998, eBay ranked second to Yahoo! in total monthly usage hours, according to Media Metrix, and its audience reach had increased 200 percent between April '98 and February '99, correct?

A. I believe that's right, yes.

Q. That's a true statement, right?

A. As far as I understand it.

Q. And in studying eBay for this case, including the materials and information I've just read, you reached the [1356] conclusion that eBay has enjoyed significant commercial success, including industry recognition and awards, as of June 2000, correct?

A. Yes.

Q. And all of that success that eBay achieved was achieved prior to any claim that eBay infringed any patent in this case, right?

A. I believe that-that timing is correct, yes.

Q. You studied at least the applications as they relate to the patents in suit in this case, correct?

A. I'm sorry; which applications?

Q. '265 patent—I'm sorry, '265 file history and the '176 file history, correct?

A. This is the application leading up to the granting of the patent?

Q. That's right.

A. Yes. I'm sorry. Application has another meaning as well. I just wanted to make sure I got the right one.

Q. Okay.

A. Thanks.

Q. So you're aware that Mr. Woolston added Figures 12 and 13 to his November application after filing his original application in April of '95, correct?

A. I couldn't tell you that for certain.

Q. You don't know?

[1374] A good, yes.

Q. That's not my question. Is it your testimony that eBay actually assures a good's bona fide availability and legal title?

A. Well, through the agreement I think they are attempting to do that, yes.

Q. Do they, in fact, sir, in your opinion. And if so, I'm going to ask you to point me to the exact language of that.

A. Do they?

Q. Does eBay, in fact, assure a good's bona fide availability and legal title? Yes or no?

A. I don't believe they have to do that, no.

Q. And they do not, in fact, do they?

A. I don't recall that, no. On that site.

Q. Let's look at another passage. I'll direct your attention to Column 13, Lines 4 through 37. I'm sorry. It is Column 13,

lines 13 through, I don't know, 16. Actually through 20. It states there, It is understood that the trusted posting of goods on a market node is a value-added feature. Do you see that?

A. Yes.

Q. Do you understand Mr. Woolston to mean there that this trusted, that his trusted network restricts the posting

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[1404] Q. Doesn't the buyer in both eBay and Half.com's system have the freedom to either pay whenever they want to?

A. Yes, I think that's true. Yes.

Q. And also in eBay and Half.com's system, the buyer always decides how much they are going to pay, correct?

A. They know how much they have bid. Or they may not know, for example, what the shipping costs would be, but they are the ones who are deciding how much they are willing to pay for the basic price of the good, yes.

Q. Neither eBay nor Half.com promises bidders that the goods will be as advertised, correct?

A. That's correct.

Q. And in fact, the buyer must trust the seller on that issue, right?

A. The buyer must trust the seller on that issue, yes.

Q. And neither eBay nor Half.com promises that the goods, in fact, exist, and that the goods will, in fact, be delivered, correct?

A. Well, I think given the agreement, the user agreement, the suggestion is that they have expectations But do they assure that or insure that? Not directly.

Q. And, in fact, in the eBay and Half.com system, the buyer has to trust that the seller—strike that. In eBay and Half.com's systems, the buyer has to

* * * *

[1407] everything in it; is that correct?

A. That I have agreed to it, and yes, that I agree with everything.

Q. Do you recall doing a transaction on eBay with Dr. Weaver about a baseball card?

A. No, I don't.

Q. How about a pen?

A. About a pen, yes, I do recall that.

Q. And during that transaction, eBay did not track who actually owned that pen, did they?

A. I don't believe they did.

Q. And in fact, eBay never knew who actually owned that pen during that transaction, right?

A. I'm not aware that they did, no.

Q. Do you have an understanding as to what a person-to-person system is, sir?

A. I do have an idea about what a person-to-person system is.

Q. What is a person-to-person system?

A. Well, a person-to-person system is one where there is direct connections between the two individuals to either share information or transact business. Where, for instance, a buyer and seller have to communicate directly with each other regarding aspects of the transaction, correct?

* * * *

[1412] earlier, it states, As the leading person-to-person trading site, eBay draws buyers with its extensive content. Do you see that?

A. Yes, I do.

4. So, in fact, you had heard of eBay as a person-to-person site, right?

A. That, that certainly is here, yes, it is. You'll see in the declaration that I had used one-to-one. I obviously didn't read as carefully down as I might have, so...

Q So also in the same declaration you submitted, Exhibit 7, correct, which was the AScribe newswire—

A. Okay.

Q. —article, correct?

A. I believe so.

MR. RANDALL: Go to exhibit 7 of that.

MR. STILLMAN: Your Honor, these exhibits were objected to by eBay at pretrial, and so now can we admit them?

THE COURT: They are not admitting anything. He's talking about his declaration. He asked him a question about person-to-person and he said he never heard of it as person-to-person, and then he's asking a question about that.

MR. STILLMAN: But it seems to me that if the

* * * *

[1414] person-to-person. Does that satisfy you, Mr. Stillman?

MR. STILLMAN: Yes, sir. Thank you.

THE COURT: Okay.

All right. Blow that up enough so that nothing else can be seen, or hardly anything else can be seen. There you go.

BY MR. RANDALL: Dr. Palmer, do you recall submitting an article to the Court in your declaration which stated, among other things, eBay is the leading person-to-person trading site?

A. Yes, I do see that now, yes.

Q. Okay.

THE COURT: Take it off.

BY MR. RANDALL:

Q. You also supplied to the Court in that same declaration as Exhibit 13 a Harvard Business School document, correct?

A. I believe so. A case, I think. Yes.

Q. And that states that eBay was the world's largest and most popular person-to-person trading community, right?

A. Yes, I see that.

THE COURT: There's no need—he's admitted to it. There's no need to put it up there. Take it off.

BY MR. RANDALL:

[1415] Q. And further in that same article that you provided and relied upon for your declaration, it stated eBay pioneered online person-to-person trading, correct?

A. My guess is it probably did.

THE COURT: You guess what, sir?

THE WITNESS: Well, I guess it probably did. I don't see it in front of me now.

THE COURT: You can show it to him, just don't show it to the jury.

MR. RANDALL: Leave it off that screen and show him that second portion of the Harvard Business School document, the portion that says eBay pioneered online person-to-person trading.

THE WITNESS: Yes, I see it. Thank you.

BY MR. RANDALL:

Q. So in fact you did supply that document to the Court under penalty of perjury with a declaration stating that the information contained in that document was true and correct, correct?

A. Yes, that's correct.

Q. And so does that, sir, refresh your recollection that, in fact, you supplied—strike that. You read articles, you provided them to the Court, you stated under penalty of perjury that the information contained in those articles was true and correct and they [1416] included a number of references to eBay being a person-to-person trading site, right?

A. Yes, that's correct.

Q. And so again, if eBay is a person-to-person trading site, you would agree that neither eBay nor Half.com infringe the claims of the '265 patent, right?

A. If all they're doing is person-to-person trading, then I would agree.

MR. RANDALL: All right. Thank you. I have no further questions, Your Honor.

THE COURT: I suspect you're going to spend a little time with him?

MR. STILLMAN: I promise I will try to be very brief, but I know everybody's tired. It's really your call.

THE COURT: Well, it's about time to take a break. I hate for you to have to come back, but you're not that far. So at this time just don't discuss your testimony with anyone. We'll see you back tomorrow at 10 o'clock.

(Jury excused for evening recess.)

(Whereupon, proceedings adjourned at 5:12 p.m.)

* * * *

[1457] THE COURT: Okay.

MR. RANDALL: And this was the document that he testified at his deposition that he and Mr. Palmer showed the patent examiner, so I'm refreshing this witness's recollection.

THE COURT: So ask him whether he showed it to the patent examiner.

MR. RANDALL: That's right.

THE COURT: Not Mr. Phillips, but Mr. Palmer.

MR. RANDALL: That's right.

THE COURT: Dr. Palmer.

MR. RANDALL: That's right.

THE COURT: Okay.

THE WITNESS: Is there any way I can get little bigger? Thank you. Great.

BY MR. RANDALL:

Q. And while you're looking at that, Dr. Palmer—

A. Yes. Okay. Thank you.

Q. You recall, at the time of this meeting with Mr. Palmer and Demetra Smith regarding the '051 application, that the Patent Office had rejected all of Mr. Woolston's claims based on three references, Save The Earth, Computer Museum and Army Knives to Gold Coins, and at that time you and Mr. Phillips were there to try to persuade Ms. Smith to actually issue the claims, correct?

[1458] A. I think that pretty well captures what the discussion was about, yes.

Q. And you showed Ms. Smith this Phillips exhibit 28 describing what you thought was a single-entity auction, correct?

A. You know, this doesn't look terribly familiar to me, but if John Phillips says this is what we had taken, that's okay. I would accept that.

Q. And the second page, and that is Bates stamped number ME0056356, in that, that is the document that you also provided to Ms. Demetra Smith, the examiner of the '051 application wherein you and Mr. Phillips represented to her that Mr. Woolston's auction system was a person-to-person auction system and you provided and discussed that chart, correct?

A. No, I'm sorry, that doesn't look familiar to me. But again, if this is what Mr. Phillips had in his declaration, I don't recall having diagramatic support of that discussion.

Q. Well if, in fact, sir, that Mr. Phillips does, in fact, testify that these were your ideas, that you came up with them, and that he and you met with Ms. Demetra Smith and discussed this with her, does that refresh your recollection?

A. It doesn't. It was a long time ago. It doesn't [1459] refresh my mind about that meeting with Demetra Smith and her supervisor.

Q. Do you agree that the advantages of a person-to-person auction system include auction facilitator incur much less overhead and risk, need not receive, hold or verify items; rather, merely provide auction mechanism and other mechanisms to protect its interests. Do you agree with that?

A. Well, if there's a person-to-person auction system, again, my definition of person-to-person is that there's the direct individual going to the direct individual. If it's facilitated in some way so that there is some person-to-person facilitation, that intermediation and facilitation, one of the things that facilitator and intermediator does is, in fact, reduce risk, because they are trying to make it a more trusted environment. So yeah, I would agree that if there is an auction intermediary that makes this happens, one of the things they are doing is reducing risk.

Q. Let me ask you, do you agree that the second page of Mr. Phillips' deposition Bates stamp number ME0056356, depicts a person-to-person auction system as you understand it, sir?

A. Can you give it to me again, please?

I think this diagram does a good job of [1460] identifying, yes, an intermediated auction system where the people, a person was a buyer, another person was a seller, yes.

Q. That wasn't precisely my question.

A. Okay. Sorry.

Q. Does what is depicted on the second page of Phillip's Exhibit 28, specifically Bates stamp number ME0056356, depict, in your opinion, a person-to-person auction system? Yes or no?

A. Well, the person-to-person auction system I haven't defined. I defined person-to-person transactions and systems. I think this diagram does capture what an intermediated person-to-person auction system would be, yes.

Q. And is, in fact, eBay a person-to-person system pursuant to your understanding of the term?

A. No. My understanding of the term, which I gave earlier today, was that it would be a direct connection between the buyers and the sellers. I believe it's an intermediated auction system, but I don't believe it's a direct person-to-person auction system.

Q. Is what is depicted here in Page 2 of Phillip's Exhibit 28, do you believe that definition of a person-to-person system is consistent with the definition of a person-to-person system that you've provided to the jury in this case?

[1461] A. I think it is a, has the facilitator in between the people, and so my basic definition is that it has to be a person-to-person, non-intermediated. But what this does define is an auction system where there is an auction intermediary that allows person-to-person transactions to occur.

Q. And your opinion, a person-to-person system that has a facilitating platform in between the buyer and seller is still nonetheless a person-to-person system, correct?

A. Well, I think there is this extension of person-to-person where there is facilitation, yes.

Q. So your answer to my question is yes?

A. But the facilitator is -- my answer to your question is there is a facilitated person-to-person auction capability.

Q. Like eBay, right?

A. That's part of what eBay provides, yes.

MR. RANDALL: No further questions.

THE COURT: Short? That's what you're holding up? Short?

MR. STILLMAN: Very short.

FURTHER REDIRECT EXAMINATION

BY MR. STILLMAN:

Q. Mr. Randall pointed you to specific portions of the specifications. Let me ask you to look again at Column

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[1610] THE COURT: You were placed under oath on Friday and, of course, you are still under oath.

THE WITNESS: Thank you. Ms. Albert.

DIRECT EXAMINATION

BY MS. ALBERT: (Cont'd)

Q Good morning, Dr. Frieder.

A Good morning.

Q Based upon your computer science expertise, are you aware of measures that can be implemented by electronic markets and electronic auctions to enhance the trustworthiness of their systems?

A Yes, I am.

Q And what are some of the measures that can be used to help implement a trusted network or system?

A Well, there are two types. In order for me to explain what I mean by there are two types, first of all, I have to explain what the word trust is. The dictionary definition of trust is basically to place confidence. Confidence is a feeling of reliance. So when you are talking about a trusted system, what you are talking about there are technical means of doing it, and then there are belief means of doing it. What I mean by technical means, you can have security communications; you can use encryption; you can have logins with protection; you can have a monitoring, for example, intrusion detection, make sure no one comes to you

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[1680] Q Do you think the way—strike that. In reaching your conclusion that you believe eBay is a trusted network or system, do you believe that the way in which payment is received by a seller, do you think that's part of the trusted system?

A Could you repeat the beginning?

Q Is the way in which payment is processed—

A No. The whole thing that you started, the whole phrasing of your question.

Q I'll ask another one. Do you believe that the process—

A You don't want the answer to the previous one?

Q Sir, I'm going to ask a different question.

A Okay.

Q Do you believe that the process by which eBay may handle credit cards, for example, do you believe that that is part of this trusted network or system?

A I understood that as a computer scientist and as necessary for my understanding of the '176, that as long as it provided some secure way of handling the purchasing and the selling and providing the secure way, obviously, for the browsing and searching that -- and it had all the other necessary measures, that this would be what was necessary for an electronic auction. I did not look into the specific on how it handles credit cards except for the assumption, of course, and except [1681] the understanding that your need to be secure. You need to have some kind of—you don't want to give your credit card in a secure system without having some guarantees that it's not going to be distributed all over the place and it's not going to be sent all over, and it's you, etc., etc. Some kind of security measures.

Q By the way, how would someone of ordinary skill in the art know what is a trusted network within Mr. Woolston's patent and what is not a trusted network within the meaning of his patent?

A Trust is—by the way, trust is—and that question is very difficult to answer because trust is not an absolute. Trust

is a goal. As I said, it's in order to place confidence. So if you get the feeling that you are secure, you can trust it, then it is a question of trust. And there are many measures that demonstrate to increase your comfort level of trust. And if you have these things, then you will probably be trusted.

Q Do you have anything further to add to that?

A No. Based on—so would one of ordinary skill in the art that requires a little higher degree of trust and comfort, would that standard for what is and what is not a trusted network within the meaning of the patent be different from another person of ordinary skill in the art that's very [1682] trusting and he has a low threshold of comfort?

A Look, I work in many places. I do consulting for lots of organizations where trust is of utmost importance for the national security of this country. Obviously, different levels requires—different items require difficult levels of trust. The level here is to support confidence that you would buy, sell, search or browse items in the electronic market in a secure environment or a trusted environment, which is obviously different than if you are trying to deal with some national security secrets. But it's a notion that the—as it says for this application, the trust is to place confidence. You are willing to buy, sell, search, browse online if you are talking about electronic market or, as necessary, for electronic auctions as well. Does that answer your question?

Q No.

A Then repeat it.

Q Well, are there different—strike that. If you line up 10 people of ordinary skill in the art, 10 of them, given that all of them may have different levels of comfort and trust that they need, would you agree that each one of them has a different line to draw about what is and what is not a trusted network within the definition that you are applying to Mr. Woolston's patent?

A Well, generally, there is certain fundamental things that [1683] have to be there. And beyond those fundamentals

such as it has to have some Web protecting the key assets, it has to have some kind of a way of identifying yourself to make sure it is, like logins and passwords. You have to be able to guarantee that you are not going to be able to—that your stuff is not going to be circulated all over the place, some kind of privacy, some kind of assurances. And once you get to that minimal level—and yes, sure, there is going to be a difference that varies. But you have—in order to be trusted I think in a common person, one of ordinary skill in the art as necessary for this patent will understand to a certain level of what is a minimal basis. Did I answer your question?

Q I don't think you did, but I think you tried. Let me ask you—

A Then please rephrase it.

Q —do you understand how the trusted network in Mr. Woolston's patent describes processing a payment?

A No. I didn't study that in great detail. It was not necessary. I didn't study it at all. It was not necessary for—in my understanding of the claims. I understand you have to have a trusted means of processing the payment because that has to have a means to support trusted buying, selling, searching, and browsing online, a trusted environment. So I understand the level of trust. But I didn't—as long as [1684] there is some trusted way of processing payment to buy, then it was fine with me.

Q Well, did you just testify that you believe that Mr. Woolston's patent, and specifically, a trusted network, requires a trusted means for processing payment, but you didn't bother to understand that concept in Mr. Woolston's patent?

A You asked me—I needed to decide about eBay and Half.com infringing both—Half.com both directly and an inducement and eBay induced, and I had to understand what they supported for trust, and the places I also am looking for to demonstrate that they are infringing on these claims, and therefore I looked. And their own literature said, they talk

about trusted means of processing. So I just took it as necessary.

MR. RANDALL: Can you pull up number 17? I just want to pull up a couple of slides from the patent. I'm looking for number 17 which is a different -- do you happen to have that? I'll direct you to the patent.

BY MR. RANDALL:

Q Let's go to the '176 patent, Column 4, line 66 and 67.

A The last two lines?

Q Yeah. This is under the section called, The sale. Do you see that?

A Uh-huh.

* * * *

[1923] And I understand that this case is complex. understand that it's hard fought. But, boy, you all have known about most of these issues for a long, long time, and it just—again, I'm not going to keep repeating myself because if I do, I don't want to get upset this early in the morning. Frankly, I'm trying my best to keep my cool. I think I have kept my cool as best as I can. People who know me know that I don't blow up in court. But it can happen, I can tell you. There is only so much that one person can take.

And I understand that you all are under terrible pressures, and I understand that; but you all have to understand also that the court is under terrible pressures because you all are out there to do your job. And let's face it, you all are out there to make sure that you don't make any mistakes, but you would like to have a record where you can appear before an appellate court and at least say that maybe the judge made an error. And I certainly don't want to make an error. But I can't say that I haven't already and I certainly don't want to in the future.

You know, I started looking through—spent most of the weekend looking through the jury instructions, and I have to

say this. Whoever—I'm not going to point—but whoever followed, for instance, the model instructions, the Federal Circuit model instructions, you start reading them carefully and there are little words changed here and there. In some [1924] cases there is more than just little words changed here and there. And when I practiced law, and since I have been a judge, anytime someone has ever referenced a model jury instruction and anytime there has ever been a change to a model jury instruction, no matter how minute the change is, they would put in there "as modified." I didn't see any "as modified" in there. I saw model jury instructions with a lot of other case cites.

So I'm kind of—at first I was sort of assuming that, okay, the model jury instructions were followed. And then I started reading them, and then I started reading the objections to the jury instructions and I find, no, they weren't followed, they were modified. I think it's absolutely improper to refer to an instruction as a model jury instruction if it's going to be changed in any way without saying it's modified to give—and I think you all know what I'm talking about.

MR. STILLMAN: I know exactly what you are talking about, and I won't say that our side wasn't guilty of it.

THE COURT: I will. I will.

MR. STILLMAN: I will tell you that I told my team that they should not modify, and I think they would confirm that one word of the model instruction. I heard after we filed them that they did.

THE COURT: They certainly did.

[1925] MR. STILLMAN: And I chastised them for doing so. I will tell you that I don't think we modified them any—we are any more guilty of that than the other side was.

THE COURT: The other side didn't, rightly or wrongly, didn't rely on the model instructions as much as your side

did. But I don't think there is one in there—and I could be wrong. Of the dozens and dozens of jury instructions, I don't think there is one in there where the model jury instructions isn't cited as—at the bottom of the instruction where it says "as modified."

MR. STILLMAN: And if we did that

THE COURT: You did do it.

MR. STILLMAN: We were wrong. I mean, unfortunately, I have not been able to do everything in this case, and I haven't had an opportunity to look at our instructions verbatim to compare them with the models. But I will represent to the court that I will do that tonight. And I will also represent to the court—

THE COURT: It's going to be harder than you think, Mr. Stillman, I can tell you that.

MR. STILLMAN: I know. I know. But I will also represent to the court that if we submitted to you a model jury instruction and did not qualify it as being modified, that is wrong, and we should not have done it. I apologize to the court, and I will make sure that it's scrubbed clean.

* * * *

[1939] Merrill Lynch or people like that, have experts within their companies that watch a certain market or a certain field, and these are people—these are objective third parties who evaluate certain things, and evaluate stocks and attractiveness of stocks for their investors. And so I found those to be very helpful in my attempt to conduct an objective analysis of the subject.

So many, many agreements. API agreements, eBay's deep linking agreement, all of the agreements that MercExchange has entered into. So it's been quite a large volume of documents.

Q Now, how does one skilled in the art actually go about objectively determining a reasonable royalty rate?

A Well, I have attempted when I have had responsibilities, such as I have in this case, to utilize as nearly as possible the methods and system that I use in my real world experience, the experience I had when I was negotiating licenses on behalf of my company, both of the company's patents and technology and technology and patents that we were acquiring from others, and I found that these licensing skills and strategies and techniques are very transferable industry-to-industry. But in order to transfer them accurately, you have to understand the industry that you are looking at.

And so I looked at the Internet commerce, e-commerce industry to see whether there were any unique characteristics [1940] that might affect the negotiation of the royalty. I particularly look at agreements, whether or not they were previous agreements in the industry. I looked at the parties' positions at the time of the hypothetical negotiation, which I mentioned yesterday, hypothetical negotiation. What positions would they have undertaken, what was their leverage or bargaining position. And this is very important.

It's sort of like when you go to buy an automobile. If you are buying a plain vanilla Chevrolet in which the dealer has two or three hundred of them sitting in his back lot, you probably have quite a lot of leverage. The dealer wants to sell those because he has inventory costs. But if you are buying a—what's popular now out in California is one of these hybred cars that has a gasoline engine that also charges a battery, and about 60 percent of the time the car runs off the battery rather than the gasoline. And there is a three-month waiting list or a six-month waiting list for those. The dealer probably has the leverage. So it's important to look at the leverage and what the leverage would be of the parties at the negotiation.

But after having said all of that, I then look at the conditions that the famous Georgia-Pacific case imposes; that is, the factors that parties would consider in negotiating a reasonable royalty. And having in mind my personal experience and the bargaining positions of the [1941] parties and the characteristics of the industry, I then look at the hypothetical negotiation factors from the Georgia-Pacific case.

Q I think you have prepared a demonstrative exhibit to illustrate those exhibits.

MR. STILLMAN: Jeff, could we look at 1378?

BY MR. STILLMAN:

Q What are we looking at, Mr. Evans?

A What this is, is a chart that—it is pretty self-explanatory at the top: Analysis of the Georgia-Pacific factors for the hypothetical negotiation of a reasonable royalty for infringement of the '265 and '176 patents. And you will recall yesterday I said that the successful patentee in a patent infringement case is entitled to no less than a reasonable royalty, and these factors are factors that are considered in a determination of a reasonable royalty.

On the left-hand side, the column is the factor itself copied from the Georgia-Pacific case, and on the right-hand side is my analysis of the factor and how I believe the factor would affect the negotiation of the royalty.

Q Now, focusing on the first factor for a moment, are you required to examine any royalties received by the patentee for the licensing of the patents-in-suit proving or tending to prove an established royalty?

A Yes, I am. May I, Your Honor? I can see the chart [1942] better if I stand.

THE COURT: That's fine.

THE WITNESS: Thank you. Yes. It's important to look at whether or not the patentee, that is, MercExchange, has

received royalties for licensing of the '176 and '265 patents, the patents-in-suit, and whether or not that licensing, if there was licensing, would prove or tend to prove an established royalty. And there are some courts that said that if there is an established royalty, that you stop there. And that's what's charged in the—that's what determines the reasonable royalty in the case or in the suit.

Now, I have looked at these agreements, and while there are several agreements by MercExchange for licensing these patents, I don't believe there is an established royalty.

BY MR. STILLMAN:

Q Why not?

A Because it doesn't meet the test; that is, a test for an established royalty is a sufficient number of licenses at a typical or a standard royalty rate such as to cause one to conclude that in this negotiation that same rate would be applied. And there are decisions which define that, but basically, that's the principle.

Q Now, I notice that you have a plus in that right-hand column. Explain to the jury what the significance of that [1943] this.

A Well, of course I say the impact enhances on the reasonably royalty, and I have a plus to indicate that. And what I'm looking at is all things being equal, that this particular factor would cause the royalty to be enhanced; that is, to be increased. And by—what I mean by all things being equal, we know what kind of license this would be. It would be an unlimited nonexclusive license for the practice of the patents-in-suit, and in the licensing by the patentee which is of record in the case, has been produced.

MercExchange has licensed patents for a specific field of use, a limited field of use, and has required not only royalties, but also equity shares; that is, shares of ownership of the companies that he's licensed in some cases. And that would

not be the case here because the license is granted as an unlimited nonexclusive license for practice of the patents-in-suit in a manner in which the alleged infringer has practiced the patents.

Q So in any event, have you, in fact, looked at all of the royalties received by MercExchange for licensing its patents?

A I believe so, yes.

MR. STILLMAN: Let me ask you, Joe, if you would put up 1382.

BY MR. STILLMAN:

Q What is this?

* * * *

[1980] Q And in this case, you have earned approximately $50,000 working with the Hunton & Williams' lawyers and with MercExchange; is that right?

A You know, I haven't done the multiplication, but that's probably about right. About a hundred hours.

Q And in your testimony before either a judge or a jury, you testified about what you consider the damages to be, right?

A It's not in all cases, but in the cases in which I have testified with respect to reasonable royalty, that's true, yes.

Q And the court or the jury doesn't agree with you every time, right?

A I think that's fair to say, yes.

Q And in the Syndia v. Gillette matter, the jury found that you overstated the damages by about 10 times; is that right?

A I don't recall the exact amount. I believe it was closer to like seven or eight times, but yes, that's correct.

Q You talked about a hypothetical negotiation in your direct examination, right?

A You mean today?

Q Yes.

A Yes.

Q And did you say that the hypothetical negotiator on the other side of the table from Half and eBay would be

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[1984] has to be below the cost that it would take the parties to design around the inventions, right?

A That's an oversimplification. I think that one has to consider whether the design around, the alleged design around accomplishes the same result. There are times when in the real world when a licensee—a would-be licensee says that I can make Product X by some other process, I don't need your patented process, but it might cost him more to make it. The product might end up not being as pure, the product might not be—I have a lot of experience in the textile industry, and the polymers and the plastic or the resin that go into synthetic textiles require a certain degree of purity, otherwise the textile, when it's produced, is brown or gray rather than white.

And so it's necessary if you apply your particular rationale that the royalty can be higher than this cost difference. It's necessary to assume that exactly the same result is achieved through the design around. If there is—changes that would affect the saleability, those would have to be taken into consideration as well.

Q All right. But that was—we are back to the start which is that if at a minimum—assuming you can make these changes and still have a commercially acceptable and successful product or system, assuming you can do that, then the reasonable royalty needs to be lower than the design [1985] around cost; otherwise, the accused infringers will leave the table and say you are not being reasonable, I'm going to go off and I'll design around this thing, and there won't be a deal, right?

A Well, I have to put it in context again. I mean—

Q So you disagree with that? If you disagree, fine, you can disagree.

A I would agree if when you say commercially acceptable means the same thing. You have to take into consideration what commercially acceptable means. You might be able to have a business. You might still be able to operate. But can you operate at the same level of efficiency with the same return, the same growth rate and attract the same customers to the same degree.

Q And in that situation, in that' situation, sir, this hypothetical negotiation would result in a reasonable royalty that is below the cost of this design around, right?

Assuming that the result of the design around does not have any impact on the conduct of the business, on the attraction of the customers, etc., if there is an impact that has to be taken into consideration, but assuming all of those things, I would agree with you, yes.

Q And you have even provided opinions and you have written documents where you say that it's equally important that the royalty be reasonable so that licensees will not be encouraged

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[2002] financial statements to something else?

A I don't think revenue is the only thing that's used in financial statements, but certainly there is no—there would be appear to be no law to eliminate revenue from financial statements.

Q Revenue has been used in this country to determine how, much money a company brings in for hundreds of years, right?

A I imagine that's true, yes.

Q And, in fact, in the majority of your 400 license agreements, you have used revenue as a royalty base, haven't you?

A No.

Q No?

A No.

Q Have you ever, sir, outside of this case, ever opined that gross merchandise sales was the appropriate royalty base?

A No, I haven't, because gross merchandise sales is an element or a factor that that's unique to Internet commerce, e-commerce. It hasn't been an alternative available to me in other cases.

Q But your answer is you have never—outside of this case, you have never opined or used gross merchandise sales as a revenue base—as a royalty base, have you?

A That's correct, I haven't.

Q And at least as of your deposition a month ago, you had [2003] no experience testifying regarding licensing of network technology, have you, sir?

A. You know, we went over that in the deposition. I recall that very well, and I think at that time I asked for a definition of network technology. I have had experience, as I indicated to you, on a matter involving the use of the HTTP, hypertext format on the Internet, and I have had experience in software licensing.

Q That's not my question.

A But whatever network technology is, I suppose the answer is no, I haven't.

Q Actually, what you were asked is, What experience, if any, do you have testifying as an expert in a trial regarding patent licenses involving licensing of networking, e-commerce, or Internet payment processing technology, and you said none.

A None, that's correct.

Q It's correct then and it's correct now, right? Absolutely. I haven't had a trial since then.

Q You said that GMS was unique in the Internet field; is that right?

A It certainly is a determination or a number that in my experience is unique to the Internet field. There must be other areas where that's appropriate. But I have to speak from my experience.

Q Well, a bank. Let's talk about a bank for a minute. A

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[2021] PROCEEDINGS

(Jury entered the courtroom at 2:15.)

MR. RANDALL: Thank you, Your Honor.

CROSS-EXAMINATION (Cont'd.)

BY MR. RANDALL:

Q. Mr. Evans, would you like to see the chart from Mr. Troxel's expert report that shows that he arrived at the ReturnBuy gross merchandise sales figure by multiplying its revenue times 210 percent?

A. I don't believe I need to see it. I did refer to it during my lunch break.

Q All right. Did you also—you've read Mr. Troxel's expert reports, right?

A. Yes, I have.

Q. Did you read the part where he says, Because of the nature of its business, ReturnBuy does not show a gross merchandising sales figure. It is therefore necessary to establish a reasonable royalty rate based on net revenue.

A. I recall that, yes.

Q. But that's not what you're doing here in front of this jury, right?

A. That's correct.

Q. You're doing the opposite, right?

A. Well, you say "the opposite," I don't know that they're opposite. But I'm doing something different, yes.

[2022] Q. So you agree that Mr. Troxel would apply a royalty rate to ReturnBuy's net revenue, right?

A. I recall that he said that in his report. I think you should ask him when you cross-examine him whether that's the case.

Q. Well, you, in arriving at your opinion and telling them they ought to apply gross merchandise sales for ReturnBuy, you have disregarded Mr. Troxel's opinion on that subject, correct?

A. Well my, my—as I recall, my role in the case is to determine the appropriate royalty rate and royalty base, but based on the opinions of the liability experts, and I have done so. I wasn't relying on Mr. Troxel for this matter.

Q. If you applied a royalty rate to eBay—strike that.

If you applied a royalty rate to eBay's revenue as opposed to gross merchandise sales, you would apply a royalty rate of somewhere between eight and nine percent, right?

A. That's correct.

Q. And that would be eight or nine percent of eBay's revenue for fixed priced gross revenue, right?

A. That's correct.

Q. And that would translate to about 30 percent of

* * * *

[2036] think it's appropriate.

THE COURT: Sometimes no. But in this case it was appropriate.

Next question.

BY MR. RANDALL:

Q. You agree, do you not, that you have not performed any studies or work to determine the certainty or reliability of gross merchandise sales, correct?

A. I'm not sure exactly what you mean by your question,. Mr. Randall. I'm not an accountant. I didn't see what raw numbers were used to accumulate gross merchandise sales. I rely on the fact that gross merchandise sales is almost always

the first so-called metric that is repotted by eBay in their quarterly reports, and it must be something that's accurate and something that's representative.

Q. At your deposition on March 26, 2003, were you asked the following question and did you give the following answer:

"You personally performed no studies or work to determine the certainty or reliability of the gross merchandise sales numbers that you claim are publicly used by analysts and so forth, correct?"

"Answer: That's right."

A. Yes. And I would give the same answer today.

Q. Do you agree, sir, that you don't even know what [2037] comprises gross merchandise sales?

A. It seems to me that the number is very self-defining. It's the value of the transactions conducted over eBay's website or Half.com's website, seller to buyer, on a quarterly or annual basis.

Q. At your deposition on March 26 did you, were you asked the following question and did you give the following answer:

"Do you know what transactions, if any, result in a gross merchandise sale as you've used that term in your opinions?

"Answer: I haven't concentrated on that. I assume that someone will be able to answer that question if it becomes important at trial. I think that the, that gross merchandise, as I indicated before, it's the total value of the transactions conducted over the eBay website."

A. I think that's what I just said, yes.

Q. Were you asked that question and did you give that answer?

A. Yes.

Q. So for instance—strike that.

You don't know whether failed transactions would be included in gross merchandise sales, correct sir?

A. You know, I remember your questioning me on that in the deposition, and frankly I'm not sure what you mean by [2038] failed transactions. And I think that whatever is included in gross merchandise sales is a good reflection of the value of the patents. It seems like it's the basis for eBay calculating their own commissions, and it would seem to me to be a good basis for the royalty basis.

Q. Sir, I'm asking you, you don't know whether or not failed transactions would be included or not in gross merchandise sales, correct?

A. I would assume that what is reported by eBay as gross merchandise sales includes whatever transactions are representative of transactions over the eBay website. I do not know whether failed transactions are or are not included. I would presume they probably are not included.

Q. And did you—were you asked the following questions and did you give the following answers at your deposition:

"Question: Well, I'm trying to figure out, sir, what would be included within a gross merchandise sale and what would not. Would, for example, a transaction where an auction is complete but yet the buyer, for some reason, does not pay the seller, would that be included in gross merchandise sale?

"Answer: You know, I have not focused on that, but if I were to guess—I know it's dangerous to guess—

"Question: I don't want you to guess, I want you [2039] to testify.

"Answer: Okay. I haven't focused on that, but I don't believe in my opinion that it should be deducted. I believe the gross merchandise sales is just as it says, gross merchandise sales. So if it's, it's not net of anything, including failed transactions."

A. Yes, I said that.

MR. RANDALL: Okay. So in your deposition—

MR. STILLMAN: Excuse me.

THE COURT: Excuse me.

MR. STILLMAN: Your Honor, I've been lenient about Mr. Randall's use of depositions, but in order to use the deposition it needs to contradict the testimony of the witness. And so far the last two questions and answers have been completely consistent with what his answer was, and so I don't think its appropriate.

MR. RANDALL: Well, actually the record will reflect that this witness just testified a minute ago that he would not include failed transactions in gross merchandise sales, and in fact in his deposition he said he would include failed transactions in gross merchandise sales.

MR. STILLMAN: I didn't hear that. And if the record says that, I apologize.

THE COURT: All right. I'm sure you'll be careful [2040] in not using deposition testimony to impeach if, in fact, his answers are the same?

MR. RANDALL: Absolutely.

THE COURT: And not word-for-word, but basically the same.

MR. RANDALL: Right.

BY MR. RANDALL:

Q. So Mr. Evans, at the deposition you testified that you would include failed transactions in gross merchandise sales, and today you testified that you wouldn't, correct?

A. Well, in remembering what you said and what I answered today and what I answered then, I suppose that's the conclusion you would reach. But I think that my answer, my answer overall, is that whatever eBay reports as their

gross merchandise sales is; to me, a number which is less susceptible to argument and more representative of the value of the patented technology than any other number I could focus on. Details such as failed transactions, frankly, it not something that I think has, would have had any kind of a significant impact on the number.

Q. Isn't it true, sir—strike that.

You don't know, you have no—strike that.

You have no idea what percentage of transactions on eBay fail, correct?

A. That's correct. I do not know that percentage.

[2041] Q. And isn't it true that you are just guessing that gross merchandise sales is a more certain and reliable number than revenue?

A. It's not true that I'm just guessing. What I see is that eBay is a company that is growth-oriented, that focuses on its gross merchandise sales, and it asks analysts to focus on gross merchandise sales. And the growth aspects of the company axe such that the value of the patents are best reflected by that, by that number.

Q. You've stated that one of the reasons why you think gross merchandise sales is appropriate is because eBay uses that figure in SEC filings; is that right?

A. I'm not sure that—I assume that number is used in SEC filings. I'm focusing more on eBay's quarterly reports and annual reports in which that number is highlighted.

Q. In fact, you have no idea whether that number is used in SEC filings, do you, sir?

A. Sitting here today—I've reviewed the SEC filings. I think mentioned that in my direct testimony. I am not 100 percent positive whether or not it is. And, I mean, I didn't think that today I was going to be subjected to a memory test, but there's sufficient use in my review of the documents of GMS that I believe GMS is the best number to use for the royalty base.

* * * *

[2067] Q. Are you aware that eBay Motors charges a fixed listing fee of forty dollars and a fixed transaction fee of forty dollars?

A. I know that eBay Motors has fixed fees, yes.

Q. So if for example a Ferrari sold on eBay for $100,000, eBay's take would be eighty dollars, right?

A. Think that's right.

Q. And what would Mr. Woolston's take be in that situation?

A. If the, if the value of the Ferrari is included in GMS—and sitting here today I'm not sure it is,' I'm not sure whether it's the value of the Ferrari included in GMS or the amount of money that eBay receives—but if the value were in GMS, Mr. Woolston's take would be .75 times whatever that value is.

Q. Times—

A. I have not gone into that detail.

Q. Times 100,000, right?

A. If that is indeed the case, it's a matter of mathematics.

Q. $750; is that right? I'm not—

A. .75 percent of 100,000 is—1,000 would be 1 percent. So yeah, $750.

Q. So eBay Motors sold a car for $100,000, Mr. Woolston would then get 750 and eBay would get 80?

[2068] A. That's assuming that the GMS reflects the 100,000 number rather than the eighty-dollar number. And frankly I don't know whether it does.

Q. You don't know whether GMS is gross merchandise sales or revenue?

A. In that particular case I don't know whether eBay reports the cash value of the automobile or whatever they receive. I really don't know.

Q. The difference is some two billion dollars, right? I mean...

A. The difference is two billion—

Q. If eBay Motors has- sales of two billion dollars, then you don't know how the two billion dollars, whether it's gross merchandise sales or revenue? You have no idea, right?

A. Not sitting here today at this, on this, at this Stand, no.

Q. This hypothetical negotiation that you referred to is going to occur in *July of 2000*; is that right?

A. The one with eBay? Yes.

Q. And if you knew that in October of 2000 that MercExchange's board of directors determined that the entire company was worth $50,000, that would be all of its patents, lock, stock and barrel, would that change your opinion in any way in this case?

* * * *

[2073] A. Well, I realize that the '176 infringement claim relates to the linkage between the BidXS site and the eBay site and other sites under this deep linking arrangement. And I, I, it's just as I testified, that has, that obviously has a value. The value is illustrated not only by the interest in BidXS, but also the litigation with Bidder's, Edge. But I testified also that that value could not be determined based on the information that we have received.

Q. You're aware that there are a number of these factors that relate to whether or not the patents assisted the accused infringer in terms of success, right?

A. Absolutely. This is one that relates to whether or not the patents helped the infringer have success in non-patented areas.

Q. And there are a number of factors that relate to that, right?

A. This is the one that most directly relates to it. Others measure commercial success-, but presumably the others relate to the direct benefits, and to the direct, for example, royalty base.

Q. You're aware that by the spring of—strike that. By July of 2000, eBay was a huge success, right?

A. Yes.

Q. And eBay was a huge success by July of 2000 without any use whatsoever or assistance by Woolston's [2074] patents, right?

A. I believe that's true. But I believe that eBay felt that, to continue its growth and continue its success, it needed to have the use of the multiple database searching, and later to be able to offer Buy It Now, fixed price sales. And that was a part of its plan of continued growth and continued increased market capitalization.

Q. You thought in July of 2000 that eBay thought that it needed the use of these multiple database searches, but eBay doesn't infringe the '176 patent directly, do, you understand that?

A. They, they thought that they should, they should be able to allow others to do so. And I think there's no doubt, based on what I have said several times, that eBay had a genuine interest in the '176 searching functionality or technology, and that's exhibited not only by the bidders, the BidXS deep linking arrangement, but also by the Bidder's Edge litigation.

Q. You thought that practicing the '176 invention would be beneficial to the success of a company; is that right?

A. To eBay?

Q. To any company.

A. Yes. Sure. Yes.

Q. And you believe, based on your review of all the

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[2189] appropriate royalty—

Q The question is just simply this.

A Well—

Q Sir, the question is simply this. Were you asked this question and did you provide this answer? "They instructed you what the appropriate royalty base was, and you applied the reasonable royalty rate that Mr. Evans had come up with

to that royalty base to determine what the appropriate level of damages would be; is that correct?

"Answer: Yes. That's essentially what happened."

A Well, that's certainly the question and the answer. I think it's misleading to take this out of context without understanding what I meant when I was talking about reasonably—the appropriate royalty base.

Q You did not, sir, in this case, perform—strike that. You made no particular effort at all in this case to do a Georgia-Pacific factor analysis or to adjust it upwards or downwards, right?

A That's correct. I did not. I'm aware of what Mr. Evans did, but I did not perform any independent Georgia-Pacific analysis.

Q Now, you have taken no formal education courses relating to networking, the Internet or e-commerce, right?

A No, I have not.

Q You have conducted no studies of the reasonable royalty [2190] rates that would apply to patent licenses in the area of computer networking, Internet transactions or e-commerce, right?

A No, I have not.

Q You have not testified in court ever as to what a reasonable royalty would be on infringement patents relating to Internet transactions, right?

A No, I have not.

Q Except for this case and Goto.com case, you have not performed any consulting work that relates in any way to Internet transactions, networking or e-commerce, right?

A That's correct.

Q In your expert report, you asserted that your damages analysis was based on the expert report that you issued in the Goto.com litigation, right?

A No, that's not correct.

Q You didn't say that in your expert report?

A I don't believe so. I have a copy of my report here.

Q Why don't you look to your September 27, 2002 report at paragraph 16.

A I'm sorry, what was the page again?

Q Paragraph 16.

A Okay. Thank you. Yes, I see that. But I don't think I say I relied on the Goto.com data. Did you want me to read this or—I'm not sure what the question is.

[2191] Q All right. Hold on. One second. What I- have here is, paragraph 16. It states at the first bullet point—are you with me?

A Yes, sir.

Q —the 4 million was a settlement based on the damages calculated in the expert report that I issued in that matter. Do you see that?

A Yes.

Q In fact, you don't know whether you issued an expert report in that matter, right, sir?

A I could not remember at the time of my deposition. I know the question you are referring to. I could not remember that I specifically issued, an expert report. I did issue an expert report in that matter.

Q And was that produced in this case, sir?

A I believe it was—it was confidential, and I know I had destroyed my copy. Well, to answer your question, I don't think it was.

Q And back at your deposition just a month ago, you said you didn't know one way or the other whether you issued a report, right?

A Yes, that's what I said, that I could not remember whether I had issued a report or not at that time.

Q You also provided in your expert report that both you and Mr. Evans had reviewed an expert report from Mr. Palmer, and [2192] you had relied on it in forming your opinions, right?

A Yes, that's correct. I mean, the report said that it was part of the consideration, but I think both of us stated in our

depositions that that was an error, that Mr. Palmer's report never did get issued or written. It was just an oversight that was not taken out of the statement, the declaration.

Q An oversight?

A An oversight, yes, sir.

Q Both you and Mr. Evans signed your expert reports saying that you had relied—read and relied on Mr. Palmer's report when, in fact, that report never existed, correct, sir?

A That's correct.

Q You were paid $300 per hour for this service, right?

A Yes, that's correct.

Q Most companies don't have a gross merchandise sales figure, right?

A That's correct.

Q In fact, you can't even think of another company that has a gross merchandise sales figure outside of this case, right?

A Well, it would have to be anybody in the auction business who would certainly have a gross merchandising sales figure. It would have to be somebody who does something like an auction. You also have companies like Leftbid.com, for example, would be a company at that time has gross

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[2196] out. I didn't think we had—reducing the damages I didn't think would be a particular problem. That's rarely a problem with the defendant.

Q throughout this entire case in your three reports, you came up with this damage figure that eBay owed Merc-Exchange for the '176, some $10 million, without any data or information supporting that?

A We had data. We based it on international sales, and we thought that was a reasonable representation. Now, the attorneys found out more about how that worked out and what the relationships were, and it was finally decided that

really that was a very tenuous number and we dropped it. I don't know how else to say it.

Q What does international sales have anything to do with the '176?

A Originally it was thought that the international sales were on separate databases. I'm trying to remember the history how we—this whole thing got started. But I think everybody thought that it was on separate bases, and therefore it infringed the '176 by moving those between those databases.

And then it was found out that wasn't the case, that eBay actually had a centralized database, and this was not a searching of these various database for this information. And so originally, the concept was that international would be a—the sales that they made, that eBay made internationally [2197] would be a surrogate.

We had asked, of course, for benefits that the that would be attributed to other people's scraping the eBay database, and that was never provided. So we had—we were left with a position of not having a better data. We had this old data of the international which really obviously was not: going to be correct. And other than saying we knew it had to be conservative, it just didn't seem to make any sense to use it.

Q Were you aware that the contention that MercExchange's lawyers originally made, that these international sites infringed, was withdrawn in June of 2002? Were you aware of that, sir?

A Yes.

Q Then why did you continue with your opinion that eBay still owed $10 million in damages for those international transactions?

A Because it was certainly felt there was infringement, and that the international sales was the only—might be a reasonable proxy for the amount of the scraping that did go on which—I mean, it's known that there are agreements with

eBay and at least BidXS to use their database which I am told is an infringing situation, and that this perhaps the—at least the international was a conservative number. And then you stop and think, well, being just conservative isn't really [2198] justification for doing that, and that's when we took it out.

Q A month ago at your deposition you were comfortable that eBay owed $10 million, right?

A At that time that was really what precipitated the discussion between Mr. Evans and myself, was that after our depositions, as we were thinking about it sitting in the deposition, it became evident afterwards to us that that was incorrect and we changed it.

Q Did you think about submitting a supplemental expert report to let us know before trial, before we are standing in front of this jury, that you no longer are seeking $10 million?

A Well, that's really not my province, sir. I mean, this has to be the gentleman seated behind you there who instructed me whether or not it would be appropriate to issue another report, and suffice to say, I was not instructed to do so.

Q Did you use, sir, this rule of thumb that you are talking about? Did you use that in this case to determine what you thought the damages would be?

A No.

Q. You didn't use it in any way, right?

A I didn't say that. I used it as a check on the reasonableness of Mr. Evans' calculation, but I didn't make any—I didn't apply it in any way, shape or form to come up with a rate.

* * * *

[2200] A Oh, I didn't say that. I mean'

THE COURT: Just answer the question.

THE WITNESS: I said I used the rule of thumb for one narrow purpose, and that was to see if Mr. Evans' rates were reasonable, and that's what I used it for.

BY MR. RANDALL:

Q It was your opinion, based on all the information that you reviewed in this case and your experience, that because of the nature of its business, ReturnBuy does not show a gross merchandising sales figure, it is therefore necessary to establish a reasonable royalty rate based on net revenue, right?

A I said that in my first report and I was incorrect. That's completely wrong.

Q Completely wrong?

A Wrong. I don't know if it's completely wrong, but it's wrong.

Q When did you see the light?

A Well, whenever I last read the report.

Q It was right when you said it, right? That's paragraph 73 of your report.

A Well, except—but also in that same report, I didn't apply that. I mean, I made the calculation of ReturnBuy based on gross merchandise sales. And why that was written, I can't answer that. It's an error in my report.

[2201] Q Well, did anybody ever come up to you and say, Mr. Troxel, you are just wrong on this; this statement is therefore necessary to establish a reasonable royalty rate based on net revenue? Did anybody tell you in this case that you got to change that opinion?

A Well, I guess it shows that not too many people read my reports because no, that was never said to me as such. I did not realize that I said it in my report until I read it in preparation for the trial.

Q When did you decide that that statement was wrong?

A Well, when I read it. I read it a week or so ago and I realized it was incorrect.

Q A week or so ago?

A Approximately. Whenever I started reading or preparing for this case, for the trial.

Q You expected this to come up?

A I expected my report to come up, and so I read my whole report and I saw that it was in error.

Q Have you discussed this with the lawyers or with Mr. Evans?

A I pointed it out to the attorneys. I don't know if Mr. Evans—if I ever discussed it or not. I don't know.

Q When did you point it out to the attorneys?

A The last few days.

Q So your statements in your report, you don't believe [2202] there are any—you don't believe they are correct any longer; is that right?

A Well, that particular statement, yes. I don't understand—that was erroneous. What I was trying to do at the time was—that report, that portion of the report, of course, applied to my verification of Mr. Evans' numbers, quantified test. I didn't do that at all when I made the calculation of damages, and I can't recall what tortuous thinking escaped me to write that particular thing at that time. It's incorrect. It's wrong. But I did it correctly to calculate the rates. There is nothing wrong with the damages number. The number—what's wrong is the way that I applied it.

Q Are you finished?

A I'm finished.

Q It is true that ReturnBuy does not show the gross merchandise sales figure, right?

A They did for their fiscal year 2001. And I know they obviously must have a gross merchandise sales figure, but it was never provided to me, that's correct.

Q You remember your earlier testimony about Goto.com? You said you wouldn't want to project income going forward because you thought they were out of business, right?

A Because they weren't using a patent. Because they were not going to practice the patent.

* * * *

[2207] course, in hypothetical negotiations both parties recognize there has been infringement, and both parties recognize that, the patents are valid and enforceable. So the negotiators would say, all right, I owe you some money, and I have infringed, indirectly infringed the '176, and so we've got to come up with a number to compensate, and that's what the negotiators would say. And so this is my way of trying to come up with some number that would be a proxy for that discussion.

MR. RANDALL: Can you, Mr. Davis, pull up slide 103?

BY MR. RANDALL:

Q This is your demonstrative, right, Mr. Troxel?

A Yes, it is. That's correct.

Q For the '176 patent, MercExchange is asking the jury to provide Mr. Woolston with $1.32 million in damages for the last 18 months, right?

A This flipped over to a different one.

Q No, no. Go to 103, Slide 1. If you look at the blue section.

A Yes, sir.

Q All the way over to the right.

A Yes.

Q On the row that says Half.com.

A Right.

Q Your total damage number for the '176 from Half.com is [2208] 1.32 million, right?

A That's correct, yes.

Q And that's for 18 months, right?

A That is for—yes, that's about right.

Q And for the '265, and that's in the yellow, you are asking for 3.96 million from Half for 18 months, right?

A Yes, that's correct.

Q So the total from Half, if we go down to the purple, that's $5.28 million for 18 months, right?

A Yes.

Q Now, put that in perspective, Half's total profit for the last three years was only 1.3 million, right, sir?

A I don't know that I ever saw any of their profit figures other than that projection that they had provided.

Q Well, you don't know?

A If you had that slide that shows the projection, I could say whether that's what it was. I never received any actual numbers for Half.com.

Q Well, didn't you apply the rule of thumb to make sure that you were only asking for, only, 25 to 33 percent of their net income?

A I applied the net income—the rule of thumb as a starting point. Do you have that other—if you can put up that other slide, I can explain to you what I did with Half.com.

[2209] Q The question is did you apply the rule of thumb to Half.com's damages that MercExchange is seeking, Mr. Woolston, just to determine if you were only seeking 25 to 33 percent of their net income? Did you do that?

A I would have to look at the—what I did was to apply that to look at Mr. Evans' rate. I did not look at it on any basis of their total income in any way, shape or form.

Q Let's go to the next side, Slide 2. This is Half.com pro forma income statement, and if you look at the bottom right-hand corner under operating profit—this is your slide, right, Mr. Troxel?

A It's my compilation of the slide—of the figures that were provided to me, that's right.

Q Well, you prepared it with the lawyers to come and present to the jury, right?

A I prepared it myself, yes.

Q Thank you. Bottom right-hand corner in yellow, total operating profit for Half.com for the last three years, $1.38 million, right?

A Right. That includes that loss in the first year 22 million, and then â profit in 2001 and a profit in 2002.

Q In the last three years, net—strike that. Operating profit for Half is $1.38 million, yes or no?

A That's what they projected it would have been. I can't say what it was. This is the projection that Half.com made[2210] back in I think 1999.

Q And, in your opinion, Mr. Woolston should receive from Half for the alleged infringement of these patents over the last 18 months four times the amount of profit that Half has made in the last three years; is that right?

MR. STILLMAN: Excuse me. Could I object to this continuing reference to Mr. Woolston? Mr. Woolston is not the plaintiff in this case.

THE COURT: MercExchange.

MR. RANDALL: MercExchange.

THE WITNESS: We are here, and my understanding is, to determine the damages that MercExchange occurred—incurred, not whether or not Half.com made money. Whether they made money or not is incidental. The question is getting the plaintiff whole for his or her damages. So I don't think it's relevant, whether or not Half.com made any money or not.

BY MR. RANDALL:

Q But the question I presented to you, sir, was that it is your opinion that MercExchange should receive from Half.com for the alleged infringement of the two patents over the last 18 months almost four times the amount of profit that Half.com has made in the last three years?

A Oh, I think that's perfectly proper, yes.

Q That would violate just a tad bit the rule of thumb, would it not, sir?

[2211] A Not at all. Not at all.

Q All right. Mr. Woolston—strike that. MercExchange is accusing eBay of directly and indirectly infringing the '265 patent, right?

A That's correct, yes.

Q And that patent covers only fixed price sales, right?

A That's the interpretation that has been given to it, that's correct.

Q. And would you agree that eBay built its success on auction format sales which are not involved in this case?

A Yes. Fixed prices are growing considerably, but certainly their initial success has been very much attributable to auction sales.

Q MercExchange is asking for over 34 million in damages for the past 18 months from eBay, right?

A That's my recollection. I think that's about right. The slide is no longer up here, but I do think that's about right.

Q In fact, I think your last slide showed that you are asking for a total of nearly $43 million from eBay for just the past 18 months, right?

A Well, could you put the slide up? If you are going to ask me about the slide, I really ought to able to see it.

Q You don't know?

A My recollection is it's about that number, but I don't really care to subject myself to a memory test. Is there some

* * * *

[2233] Q. Now, let's just see if we can agree on the numbers.

You agree that, it's your testimony that at the time of the hypothetical negotiation in 2000, that what MercExchange was asking for, .75 of gross merchandise sales, exceeds eBay's entire operating profit for that year, right?

A. Well, yes. And of course they ran a loss the previous year too.

Q. So we're in agreement on that issue, right, sir?

A. Yes, that's probably true. That's true.

Q. Now, you said that the—strike that.

Isn't the purpose of this hypothetical negotiation a willing licensor, with a willing licensee, assuming infringement, they sit down, they turn up all the cards, like a poker game with all the cards turned up, and both parties have to work out a deal? Isn't that what happens at this hypothetical negotiation?

A. No, that's incorrect. Judge Markey made it very clear in Panduit that that was not the way a hypothetical negotiation ought to be conducted.

Q. Well, is your hypothetical negotiation, is the way yours would be conducted, that Mr. Woolston says, you know, here's what I want, and eBay says, okay, I guess I have to pay?

A That is not the case wither. The case is to look [2234] at what would be the reasonable amount of royalty that they should pay considering the importance of the technology to the, infringer and the value of the technology to the patent_ holder. It is a matter of—

Q. And you think—

A. It is a matter of—willing means only that, under the law, they have to come up with a rate. They're willing to do it because the law says you've got to come up with a reasonable royalty. And so to that extent they're willing. It's not a simulation of a real-life contract, real-life negotiation, it is an attempt for an equitable distribution of the, in order to make the patent holder whole.

Q. And in your opinion, in 2000, eBay would set-down at the table with MercExchange and it would be reasonable, in your opinion, for eBay to say I'm going to give you, Mister—MercExchange, I'm going to give you all of my profit, and then some? That would be reasonable?

A. No. What's reasonable would be for them to pay .75 hundredths of a percent on the amount of their gross merchandise sales. That would be what would be settled at the license agreement. And then that number would get. applied on an annual basis to the gross merchandise sales of eBay as you would go forward.

Q. And in 2000, at the time of this hypothetical [2235] negotiation, that would mean that eBay would have to turn over all of its operating income, and then some, right?

A. I assume that to be the case.

Let's see.

Q. You don't have to assume. Just please look at it and testify about it.

A. Well, let me just look at it and calculate.

They would turn over, yes, they would be expected that year to, on the basis of that, of those gross merchandise sales, to pay in excess of what they had as an operating profit. That's correct.

Which is—the answer to your question is yes.

MR. RANDALL: Can you skip a couple more slides, please? Stop right there.

BY MR. RANDALL:

Q. This is your slide about reasonable royalty for eBay's inducement of ReturnBuy, right?

A. Yes, that's correct. In the '265 patent.

Q. You never had any such slide in your report, did you, sir?

A. Certainly.

Q. Well, I'll take that back.

A. On inducement—

Q. I'll withdraw that question.

THE COURT: Let's move on to something else.

* * * *

[2298] is not going to talk about the claims. I understand that. But it is also a little improper for Mr. Robertson to get up and start testifying and arguing that he's never looked at the claims, this or that. He can do that on cross.

THE COURT: I already told him not to do it, okay?

MR. RANDALL: All, right. Thank you.

THE COURT: So you don't need to tell him. I told him.

Okay. Anything else, Mr. Robertson?

MR. ROBERTSON: Yes, Your Honor. In this expert's report, he only addressed the claims, specifically these engineering issues with respect to the '051 patent. That's what it says in his report at page 4, and that's what he addressed. He has never looked at, reviewed, and in bis report says I've never reviewed the '265 or the '176 patent. And it is the claims that are at issue here, and the claim needs to be enabled, and he can't give an opinion as to whether those claims are enabled or not if he has never looked at them and he hasn't put it in his expert report.

MR. RANDALL: Your Honor, this is the same issue that was raised before Judge Bradberry and Your Honor. He's rearguing the same thing. I can point to—

THE COURT: I don't see any difference in—first of all, when Judge Bradberry heard this issue, he originally agreed with the plaintiffs, I believe. Then he reconsidered [2299] and agreed with the defendants. That was appealed by the plaintiffs and I agreed with Judge Bradberry, correct?

MR. ROBERTSON: Your Honor, this specific issue was not in front of Judge Bradberry. Now, he can talk about what he's been talking about, the state of the art during that period of time, but when he's going to get into now the issues of whether or not the claims of '265 and the '176 are enabled by the specification, it's completely outside of his reports. It's nothing he's ever given testimony—

THE COURT: He's not going to talk the claims.

MR. RANDALL: That's right.

MR. ROBERTSON: Then his testimony is irrelevant, because that's what the jury is going to be instructed on.' Is the claim enabled? This is—I'm looking at, Your Honor, the Federal Circuit Bar Association Model Jury Instruction.

THE COURT: Are you the one who did the instructions that didn't put "modified" in there?

MR. ROBERTSON: I'm not the one, Your Honor, but I do apologize. I heard about that and I apologize. I don't know if this one's not identical to the Federal Circuit Bar Association.

THE COURT: I plan to use those instructions, maybe as modified, if I can. The jury will be instructed as to what the, hopefully what the appropriate law is with [2300] regard to this area.

Now the Court has already ruled, Judge Bradberry ruled originally that several of the experts couldn't testify because they were basically testifying as to the '051 patent. Now I think after further review he realized that it was more than the '051 patents, but the other patents were basically similar in some respects and therefore that's why he changed his opinion.

So I'm going to let it come in, and I'll let you cross-examine him, and obviously the jury will be instructed appropriately as to the law in this case.

MR. ROBERTSON: Thank you, Your Honor.

THE COURT: Thank you.

(Jury entered the courtroom.)

MR. RANDALL: Thank you, Your Honor.

BY MR. RANDALL:

Q. Dr. Crocker, based on your review and analysis of Mr. Woolstom's patent specification and your years of experience in implementing Internet payment systems, did you form any opinion regarding whether Mr. Woolston's patent specification in this case describes a business model that a person of ordinary skill in the art in the 1994/1995 time .frame could make and use without undue experimentation?

A. You asked if I'd formed an opinion. Yes, I did form an opinion when I read it.

[2301] Q. And what is that opinion, sir?

A. That it describes a, sort of a general concept, but not nearly enough to actually be able to build and operate such a system.

Q. You mentioned some of the business problems in your report, specifically settlement. Can you discuss what you mean by that?

A Settlement. When two parties agree to make a payment, that's a very important moment in time, because both parties walk away understanding that, it feels like it's happened. But in fact the money has not actually left the first person's pocket and hasn't shown up in the second person's pocket. So the distance from, or the span of time from the time the agreement is made until the money actually is moved is all part of a settlement process. There may be multiple steps in there. For example, just going back to the credit card cycle that we discussed earlier, when you sign your credit card receipt at, say, at a restaurant, then you have committed to make that payment, but you haven't gotten the bill from the credit card company and the merchant hasn't actually gotten the money. What he's got is a piece of paper.

That evening he sends in to the bank the same information again, even though it's already been sent, because now it includes the tip and so forth. And that [2302] evening there is a very heavy processing that takes place behind the scenes, and then after some amount of time, one, two or three busi-

ness days, typically, money moves between the banks—and then actually the money usually moves that night—and then the money moves into the merchant's account, into his checking account usually one, two or three business days later. Those are the settlement processes that stand behind the original transaction.

And you can look at almost any payment system, except for taking out some change from your pocket and plunking it down on the counter, but anything that involves paper or electronics is usually a considerable distance from the time the agreement is struck and you can sort of think that you've got a deal, till the time then money is actually in your possession and you can do something with it.

Q. Did you encounter settlement problems when you were at CyberCash?

A. Well, they're a core part of building the peer to peer payment systems. And the credit card system as well. And in designing a payment system, that's an absolutely central part of the process.

Q. The patent specification suggests that the participant might be buying and selling in a hot market with rapid reselling. Does that require settlement procedures?

MR. ROBERTSON: Objection, Your Honor. This is [2303] leading. And I know he's reading from the patent.

THE COURT: Sustained.

BY MR. RANDALL:

Q. Based on your review of the patent specification, does, is there any aspect of that application that you believe requires settlement procedures?

A. Well, each transactions requires settlement, and depending upon how much time and work and risk that settlement takes determines what happens after that. The picture

painted in that specification includes the idea that there could be a speculation that somebody could buy something and immediately turn around and sell that same object. If you string a few of those transactions together, I buy it and sell it to you, you buy it from me and you sell it to the next person and so forth, the money is actually trailing way behind. And it hasn't left the first person's pocket and it hasn't, doesn't get to the last person's pocket for quite a while.

If anything goes wrong in that process, and there's quite a few things that can go wrong, then everybody's left pointing fingers at everybody else.

So it's very important in building such systems to say what happens in all of those cases. Otherwise, it becomes just to somebody's advantage to make something go wrong and you have a calamity right away.

[2304] Q. In your opinion, does Mr. Woolston's specification show how to achieve settlement?

A. No. It talks about the fact that it happens and as if it's a straightforward matter. And I must say, when I read it, I said exactly how is that going to happen? It was like a big gaping hole.

Q. Based on your review of Mr. Woolston's patent specification, does it acknowledge that settlement is a -problem at all?

A. I believe it actually suggests quite the opposite; that it's a straightforward matter.

THE COURT: Mr. Randall, it's MercExchange's patent.

MR. RANDALL: I'm sorry.

BY MR. RANDALL:

Q. Would a person of ordinary skill in the art in the 1994 time frame, in your opinion, need to experiment in order to resolve this settlement question?

A. Yeah, I think it would take experimentation, I think it would take some research, and I think it would take consultation between technology-oriented people and people-who have experience with building and operating banking systems and financial transaction systems. I don't think that you can hire programmers, software engineers, who are capable of building very elaborate and interesting systems, [2305] but if they don't have any experience in that field, I think that it would be very problematic for them to try to build such a system.

Q. You mentioned in your report finality of transaction. What is finality of transaction?

A. When is the transaction finally complete. Again, if you look at a credit card transaction, I can go in and buy some-thing, and then if I have an objection, I can go to my bank and say this transaction has something wrong with it. The goods were delivered; are poor, or in some cases you have opportunity for buyer's remorse where you can un-do a transaction a few days later.

When does the merchant know that the deal is finally complete is a critical kind of question. And "so there is—the term finality is a term of art in financial transactions, and until you have finality, you can't close the books and say that that's a done deal.

And again, in looking at the potential for a sequence of transactions, the picture that's painted in that specification is that you have a series of transactions which are initiated one after another before any of, any of them have reached finality. Or if they have reached finality it's not said how that's done, and just raises a large number of questions.

Q. Does MercExchange's patent specification show how [2306] to achieve finality of transactions?

A. Not that I can see.

Q. Is transfer of ownership, in your opinion, part of finality of transaction?

A. Yes, it is.

Q. What is required to achieve finality of transaction?

A. Well, you have to have the money moved, you have to have the ownership transferred, and you have to be past the point at which there is a—let's see how to phrase this. Where somebody can say there's something deficient about this and I want to un-do the deal.

Now, there's always a time—I mean, you walk away from something and the deal can be complete, and then you can change your mind later, and the other party can say, hey, we're done, too bad. But there is a point sort of before the deal is finally closed when you can un-do it. And it's a question of exactly what is that moment and all the pieces that have to be in place.

Very much depends on the kind of transaction. Of course, it's a much bigger deal to buy a house than it is to buy a newspaper, and so the issues related—these are business and business law issues, primarily. What constitutes the finality of transaction in buying a newspaper out of a vending machine is very different from the closing of a transaction like buying a house. And then you have everything in between.

Q. Would a computer science major, in your opinion, reading MercExchange's patent specification, have known how [2306] to achieve finality of transaction?

A. No. I think there's—at the risk of being slightly lighthearted about this, I think there's only two cases: A computer science major who reads it, knows that he doesn't know, and the computer science major who reads it and thinks he might know. I would say stay away from him.

Q. Based on reviewing MercExchange patent specification, would one of ordinary skill in the art have known how to make a system to achieve finality of transaction?

A. I don't believe so.

Q. You mentioned also in your report risk management. To be—first of all, what is risk management as it relates to

payment processing?

A. Well, it's natural in building any kind of system, payment processing or anything else, is—focused on what happens when things go right. Risk management, refers to doing a sort of almost parallel defensive analysis of what happens when things go wrong? And-for that it's quite open territory where any number of things can go wrong, some of which are accidental, acts of nature, and others are due to [2308] purposeful, malicious intent or differences in goal structure of the parties involved.

Q. To be operable, does a system have to explain and set the risk management rules?

A. Well, I would think so, because particularly when we're talking about payment systems, it's just an inherent part of any payment process, that if there is an obvious opportunity for fraud or for one party to make out better than it should, then those things absolutely will happen. We're not talking about a safe world where people are around to help you. It's basically a world in which, if somebody can take advantage, they will. And that I think certainly in any systems that handle money—there may be other kinds of systems in other places where one lives in a much more benevolent world—but certainly in anything involving money, one has to look carefully at the protections and the safeguards and the mitigation of all these various kinds of risks.

Q Were these-issues that you encountered at CyberCash?

A. Sure.

Q. Well, didn't people of ordinary skill in the art in '94 and "95 already know how to resolve these issues?

A. Well, we're talking about systems that had not been built in combinations involving classical banking [2309] systems and the Internet technology and other aspects of electronics and computing. The pieces had not all been put together again—put together. They raised some classic problems, but they also raised some new kinds of problems. And

you know, no guarantee that you could see all of them, but you certainly could see a bunch of them, and not all of them had clean, easy solutions. We spent considerable time on a variety of different kinds of risks.

Q. Can you explain what these risk management rules that MercExchange's specification fails to provide?

A. Let me pick out one or two, just to give kind of a feeling for the range of issues.

MercExchange is built upon the idea of a pawnshop, shopkeepers, consignment operators, where individuals would bring some goods to be sold and put them under the care, in the custody of those shopkeepers or pawnbrokers or whatever. Then there would be the electronic announcement of these goods across these different shops and an auction or a sale or whatever would take place, and then payment process and a transfer of title and eventually delivery. That's the basic picture that's painted.

[2310] So what can go wrong in that? Well, the goods might not be as described, or the buyer may be unhappy with the goods. And so those are kind of ordinary things that you could anticipate.

But other things could go wrong. For example, the shopkeeper could go out of business. We're not talking about rocks of Gibraltar here, we're talking about large number of relatively small operations scattered about the U.S. or perhaps around the worlds. And as we've seen, you know, you can walk up to that shop one day and discover that they're out of business. Well, what happens to the goods that are inside that store? Who owns them? Can you get them back? If they have been sold, how does the person who has purchased them get them? What happens if the owner of that store has absconded with all of the goods and left both parties holding the bag? Some aspects of that has to be resolved up front.

Let me go on for just a second to paint a very different kind

of risk that is rather novel with respect to the fusion of the bricks and mortar technology with the Internet technology.

One of the attractive things to do if you have a way of moving money around, is to launder money. This invites organized crime and is a very big issue with respect to the Office of Currency Control and Justice and Treasury Departments. There are safeguards in place that prevent moving large sums of money around. So you have a limit of $10,000 for cash transactions, otherwise they have to be reported. You have to $3,000 limit on how much can be sent [2311] by money order. These numbers get moved up and down depending upon how much crime is taking place. Very complicated business.

When you have a new market being created, one of the things to examine in that market is, is there a way to put fake transactions through that system in a way that it may look on the surface that you're just conducting an auction or you're just conducting a sale, but in fact you've got buyers and sellers in collusion moving transactions around whose sole point is to actually make money show up from one place to another in a way that makes it very hard to trace or that defeats the existing currency controls.

Build a system like that with no controls, and particularly if you build a system that makes it easy to defeat that, and I can assure you that you will have a visit from a number of people carrying badges from various agencies in Washington.

It makes no sense to try to define such a system without having at least some semblance of some thought about the protections against that kind of thing.

So there's two very different kinds of risks for example.

Then there's a bunch of technical risks about system failures and about, you know, computers breaking or messages

getting lost or that sort of thing, which are also [2312] very absorbing in their own right.

Q. And do you believe that one of ordinary skill in the art, reading MercExchange's specification in 1994 and 1995, would be able to build his system without these risk management rules explained in the application?

A. Well, I don't see how at all.

Q. You mentioned scalability issues in your report.

What did you mean by that?

A. Well, it's a, it was—as I was describing earlier, it's one thing that can build a system that can handle a small number of users, a small number of transactions, and then as you scale it up to handle thousands, tens of thousands, hundreds of thousands, millions of transactions, technically life gets to be much more complicated.

If you take one of these computers that's standing around here and you hook it up so that it can handle messages that come in and out of it, it's no big deal, say, for one of these ordinary personal computers to handle, say a hundred incoming emails a day. Might be overwhelming to the person who has to read them, but it doesn't swamp that computer.

If you tried to handle a hundred thousand messages a day, the computer won't be able to keep up with it. It will run out of memory, the speed of the computer won't keep [2313] up with it, and it will just get clogged. So if you want to handle large numbers of transactions, I used just email as a ready example, but any kind of transaction, then have to start fashioning the computer power to match the amount of work that you're going to do. And each computer—you can buy bigger computers, obviously, but there's a limit to how big a single computer can get, and you have to start using multiple computers.

Also, it's difficult to bring all transactions from all over the globe to a single point. So it's important to be able to describe

these transactions and have them processed in different geographic locations, and then these different centers would have to interact with each other.

So the challenges of building a scalable system with multiple computers in a distributed fashion is very, very different from building a small, single computer which, you know, you can imagine an under-grad could do in his dorm room.

Q. In your opinion, did the MercExchange patent specification describe a scalable system?

A. No, it didn't at all, actually. It described to the extent that it described anything, it described essentially a centralized system, a single market-maker machine and then left it at that.

[2314] Q. You mentioned in your report, engineering issues regarding protocol design. What other unresolved issues, if any, did you detect in your review of MercExchange's patent specification?

A. Yes. In the area of protocol design, one of the fundamental things to wrestle with is what happens if you have more than one, more than two parties? It's one thing if I send a message to you and you wait for that and then you send me a response and I wait for that and then I send to you. The minute we involve a third party and we want to get some three-way communication going, it's very challenging to work out what the sequence is going to be. If I send a message to both you and to somebody else and I expect that both of you have got it, what happens if one of those messages is lost? What happens if they arrive, if you get it substantially before the other person gets it? What, happens if you take my message and you forward it to the third person and it arrives before my message to them arrives?

So these are technical—I mean, I'm now descending down into the sort of nuts and bolts issues.

In the CyberCash protocols that we built, for example, one

of the things that we were careful about is getting that sequence right. You may recall that we had the consumer send the merchant his credit card information, but [2315] we didn't want the merchant to be able to see the credit card information. One could have asked, well, why not just have the consumer send to our gateway the credit card information? That way it never goes to the merchant, and you never have the problem of revealing the credit card. And the problem is that if you do that, then you have a terrible problem synchronizing the transaction and making sure that the merchant knows that it's been sent and informing the merchant.

This way we were able to solve the synchronization problem of breaking it down into a series of bilateral, two-way transactions, and yet tunnel, if you will, or protect that information as it passes through the merchant.

So there was, it may not strike you immediately, but that was a subtle piece of design that solved that problem with respect to having multiple parties participate in a single protocol.

Q. Based on your review of MercExchange's patent specification, do you believe that it adequately describes the protocol design necessary to communicate among a distributed set of consignment nodes.

A. It was basically completely_ silent about that.

Q. Did you draw any final conclusion from your analysis of MercExchange's patent applications?

A. Well, it described a particular business model, as [2316] I said, of having shopkeepers, pawnbrokers, small shops, try to share their listings of items on consignment. And you know, it basically stopped at that point. And my reaction when I read it was that if I were evaluating it as a business plan; I would throw it back and say you haven't solved the hard problems. And if it were coming in as a term paper in a course I was teaching, I would give it a pretty low grade and say you've just begun with the preamble, and now you've got

some hard work to flesh it out and make a system out of this.

Q. Based on your opinion, did MercExchange's patent specification adequately describe the business and technical issues necessary to understand his concept?

A. I didn't find enough information in there for either the business issues or the technical issues.

Q. Based on your review and your experience—strike that.

Based on your review of—I'm sorry.

Based on your review of MercExchange's specification and based on your experience, did you draw any conclusion about whether one of ordinary skill in the art at the time, 1994 and 1995, would actually be able to build that system without undue experimentation based on the disclosure?

A. I did form an opinion, and the answer is there's [2317] not enough information there.

MR. RANDALL: Your Honor, I have no further questions.

THE COURT: Mr. Robertson, I don't know how long your cross is going to take. Do you want to—

MR. ROBERTSON: It's going to take longer than 15 minutes, Your Honor.

THE COURT: Okay.

MR. ROBERTSON: Would you like me to start, or do you want to break and start fresh tomorrow?

THE COURT: If you know you have a good breaking point in about 15 minutes, then we can go ahead and start. If not, I'll let you start tomorrow.

MR. ROBERTSON: Why don't I see if I can go for about 10 minutes or so?

THE COURT: Every 10 or 15 minutes would help.

MR. ROBERTSON: All right. Sure thing.

CROSS-EXAMINATION

BY MR. ROBERTSON:

Q. Good afternoon, Dr. Crocker.

A. Hello.

Q. Dr. Crocker, I understand you rendered two reports in this case; is that correct?

A. Yes.

Q. And one was a June 10, 2002 report; is that

* * * *

[2435] THE COURT.: Ms. Albert, if don't stop shaking your head. It's very difficult for me when you are shaking your head and I'm trying to look at Mr. Robertson, okay? Thank you.

MR. ROBERTSON: If he wants-to elicit what is stated here, I won't have an objection. But if he talks about search agents searching the plurality of electronic markets or auctions, it's not in the report, Your Honor. Search agents are—

THE COURT: You are limited to what's in the report.

MR. RANDALL: Absolutely. And I have said that consistently. And we've had these arguments before. But I'm going to elicit straight from the' report and you have my word on that.

MR. ROBERTSON: He's not an expert in search agents.

THE COURT: If it's in his report he can testify to it, Mr. Robertson. That's it.

MR. ROBERTSON: If he wants to qualify him as an expert in search -

THE COURT: Okay. I won't qualify him as a, quote, expert in search agents. I'll simply qualify him as an expert in e-commerce, computer science—

MR. RANDALL: And searching databases, how about

that?

THE COURT: How's that?

* * * *

[2491] can't unplug this thing.

In the record it states, "Now this is different than the ReturnBuy issue in many respects," talking about the GoTo.com case, "and therefore in order to comply with Federal Rule 408, the Court will let in, the defendant's seek that the agreement be redacted to remove any statements by GoTo.com concerning the validity of the '176 patent." It says '165, sic. "So therefore the Court will let it in subject to any redactions that the Court or the parties need to make." And we go on through it.

I thought that was pretty clear that the Court was going to redact, or at least indicated to the parties that what should be redacted is statements regarding, the vapidity of the patents. I think what Mr. Robertson argued at the bench was that settlement agreements or license agreements should come in in general. The specific issue was whether a admission of validity should come in or not. I think the Court made it very clear that that should be redacted.

THE COURT: I looked at my notes after the conference.

MR. RANDALL: All right. And it's that type of thing from the witnesses repeatedly and from Mr. Robertson that I can't tolerate.

THE COURT: You have the same transcript that has

[2492] MR. ROBERTSON: Your Honor, I haven't seen the transcript.

THE COURT: You might want to look at it.

MR. ROBERTSON: I'll do that. I mean, I apologize. You know, if that was the ruling, I mean, maybe there was some

ambiguity, because there is—

THE COURT: I'm sure you didn't mean to do it.

MR. ROBERTSON: But, you know, Your Honor there's a lot to keep in your head at the time and—

THE COURT: I understand, believe me.

MR. ROBERTSON: And I apologize, in the heat of battle, with the witness on the stand, you know, I apologize. If that's the ruling, then that's the ruling, and I apologize to the Court.

THE COURT: That's fine. I appreciate that. Okay. We'll take a break.

(Court recessed from 3:40 until 3:56.)

MR. RANDALL: Your Honor, with respect to

Dr. Crocker, I'm not asking that you inform the jury of anything with respect to his expert status, but I just want the record to be clear that the Court did accept him as an expert; is that right?

THE COURT: Yes.

MR. RANDALL: Dr. Keller, I'm sorry.

THE COURT: Yes. I assume we have the same, not

* * * *

[2509] the parties, both sides.

Q And included in the depositions that you reviewed, did you review the deposition transcripts of Mr. Woolston and the depositions of plaintiff's damages experts, Troxel and Evans?

A Yes, I did.

Q Have you reached a conclusion in connection with your work in this matter?

A I have.

Q What conclusions have you reached?

A I have reached a number of conclusions. To summarize briefly, first; I believe that the use of gross merchandise sales for purposes of calculating damages is inappropriate.

Second, I believe that plaintiff's experts ignored, and should not have ignored, the possibility of designing around the patents that perhaps could have been done by eBay. And I think that was a second error.

Third, in their damage base, Mr. Evans and Mr. Troxel included transactions that may have not been infringing. This is separate and apart from relying on gross merchandise sales. And to the extent that was true, damages would be overstated.

Fourth, I believe that they also ignored certain license agreements that were entered into by eBay. One of those was before, what was in 1999, and involved a license payment by easy of $275,000 for an online information service [2510] patent. A second license agreement entered into by eBay at around this time period involved outright acquisition of online commerce patents for the total of $675,000. As far as I can tell, that information was ignored by plaintiff's experts and I believe should not have been. So those are at least four areas where I think plaintiff's experts have overstated damages.

Q And do you believe that, based on your work, that plaintiff's damages experts fully considered and appreciated the valuation of MercExchange as a whole in connection with their opinions?

A No, I don't. There was a transaction entered into by MercExchange in 1999, which is prior to the time that a negotiation between the parties would have taken place, whereby 10 percent of the stock in MercExchange was sold for $250,000. What that means is that the value of the entire entity would have been 2.5 million for all of the patents and any other value that existed within the entity. That's 2.5 million for everything, including these patents plus perhaps

other patents plus other assets. As far as I can tell, plaintiff's experts ignored that transaction.

Q And with respect to that valuation, how would that affect your opinion about what eBay or Half would have agreed to at this hypothetical negotiation?

A Well, if the value of the entire—including not just [2511] the patents-in-suit here, but other intellectual property as well was 2.5 million, then the value just of these patents would have to be less than that.

Q You also mentioned in the conclusions that you reached that you believe plaintiff's experts did not fully appreciate or apply the fact that eBay and Half could have designed around these patents. What effect would that have on the hypothetical negotiation?

A Well, as matter of economics, if a company is able to ,incur certain costs to design around one or more patents, those costs then set a cap or become the maximum the company would pay to take a license for those patents. That's true, because if you can figure out a way to avoid using the patents at a certain cost, then you will avoid using those patents by incurring that cost unless you can acquire the right to use the patents for less money than it would cost you to design around them. And as far as I can tell, plaintiff's experts did not take into account that possibility.

Q And based on your work in this Case, have-you reached any conclusions about the absolute, maximum worse case scenario damages that could be awarded to Merc-Exchange if the patents are found to be valid, if the patents are found to be infringed?

A Yes, sir, I have.

Q And what would that be?

[2512] A The maximum damages, assuming the patents are valid and infringe, would be 1.2 million against eBay and 1.2 million against flalf.com.

Q And have you formed any opinion with respect to_ whether that would be appropriate or not?

A Well, in my opinion, that would significantly overstate maximum damages here for the following reasons. First, the design-around cost, as I understand it, based on information made available to me from eBay's consultants in this area, would have been less than $15,000 and could have been accomplished—

MR. STILLMAN: Excuse me, Your Honor. I object to this testimony. Certainly an expert is entitled to rely upon hearsay testimony in forming his opinions, but this expert is testifying about a substantive fact that is not in evidence regarding the cost of any alleged design around that eBay may be able to accomplish. I don't think that's an appropriate reliance upon hearsay testimony for the truth of its contents.

MR. RANDALL: I think it's appropriate for experts to rely on information that other experts generally rely on. This expert is relying on expert reports and statements and opinions contained in other testifying expert reports. He put this information in his report. The other information he's relying on. It's in our technical expert reports, and it's been fully disclosed and provided to plaintiff's.

* * * *

[2515] MR. STILLMAN: Yes, sir. Yes, sir. But I'm just concerned about confusion on the part of the trier of fact that now they believe there is evidence of an $8,000 design around in this case and there isn't.

THE COURT: I think you can deal with that very well in your cross-examination when you ask him certain questions. I think it's appropriate. And you will be given every opportu

nity to cross-examine him. And I think that would be an appropriate question to ask him, frankly.

MR. STILLMAN: Yes, sir, and I agree. The thing that's a bit unfair is I'm not going to be given the opportunity to

cross-examine Dr. Weinstein after I have cross-examined the factual witness, and there may be things that come out in the course of that that would have a material effect upon his opinions which he doesn't know yet, and that's what's a little bit unusual about this situation. But you are exactly right, I can cross-examine him.

THE COURT: Okay. The objection is overruled.

(Whereupon, the jury returned to the courtroom.)

THE COURT: All right. Your last question?

MR. RANDALL: I believe what we were talking about-is the reasons why Mr. Weinstein believes that that maximum damage figure would be overstated.

BY MR. RANDALL:

Q And you were providing your reasons why that would be an [2516] overstated or inappropriate number. Can you please continue with your explanation?

A Yes. One reason why it, in my-view, would be overstated, it has to do. with possibility of design-around cost. And my understanding is that eBay could have designed around this patent in the amount of time that it had between the. hypothetical negotiation and the onset of the damage period, and that the cost of designing around this patent—these patents is less than $15,000; and, as a consequence, that investment on eBay's part, if in fact those are the design-around costs, would set a cap on the amount that eBay would be willing to pay in royalties for use of this technology.

In addition, as I mentioned—and I'll just go back very briefly—eBay took two licenses for online commerce patents at around this time period and paid $275,000 for one and approximately $675,000 for others, the second being a group of patents. Those provide a measure of what eBay was prepared to pay for technology at the time. So either of those kinds of concepts indicate to me that even the 1.2 million

against eBay and Half.com would be an overstatement of damages here

Q And your understanding of the design-around issues and costs came from—what was the basis for that?

A That comes from consultants retained by eBay to address [2517] that question. That would be Mr. Wellman for the '265 patent and Mr. Maly for the '176 patent. So I rely on their reports and their estimates of how much it would cost and how long it would take to do a design around.

Q Why do you think that gross merchandise sales is not the proper royalty base to use in this case?

A Gross merchandise sales is not the proper base to use for several reasons. First, eBay doesn't get paid gross merchandise sales. EBay receives net revenue money; and, as a consequence, it would not take a royalty based on merchandise sales where that—it's not receiving money for.

Second, in my experience, in matters such as these and looking at literally hundreds of license agreements, I have never once seen a license agreement where royalties were computed on a concept like gross merchandise sales. In virtually all instances royalties are computed based on revenues received, actual money received as a result of the use of the technology in question. Companies pay royalties based on the monies they get. They don't pay royalties on a concept like gross merchandise sales. I have never once seen that.

Q What's your understanding, if any, as to why it would be applied in this case, gross merchandise sales?

A I have reviewed the reports of Mr. Troxel and Mr. Evans. I don't see any basis for using gross merchandise sales. In [2518] their reports they talked about referencing certain license agreements that MercExchange had entered into. I have looked at each of those license agreements. None of those agreements contemplated the payment of royalties based on gross merchandise sales. Each of those agreements

made use of net revenues, revenues received for purposed of calculating' royalties. So I don't see any basis for using merchandise sales based on my review of their work.

MR. RANDALL: Can you put up demonstrative number 1?

BY MR. RANDALL:

Q Mr. Weinstein, can you tell me what this demonstrative is?

A Yes. This is an exhibit which was prepared under my direction at Micronomics of certain license agreements that were referred to by Mr. Evans and Mr. Troxel in their reports. The agreements that I am talking about here are in the column that says agreement. There are five going down the page. And then the royalty base that is used in each agreement, based on my review of those agreements, is shown on the right-hand side of this document.

So I went through five different license agreements that Mr. Evans and Troxel referred to in their work to see if, in fact, those agreements made use of' gross merchandise sales or a concept that was revenue based, such as revenues collected or net revenue.

[2519] Q And what's your understanding of these phrases for the Leftbid and Aden agreements where it says—and I'm paraphrasing—revenues collected or earned or fee amount collected or earned? What does that mean?

A To me it means money that comes in the door. It's revenue.

Q Does that mean gross merchandise sales?

A No, it definitely does not mean gross merchandise sales. It means actual money that comes in the door.

And if, for example, Troxel and Evans said that they believe those agreements represented a royalty base based on gross merchandise sales, would you agree with that?

A I would respectfully disagree. I don't think those agreements have a royalty base based on gross merchandise

sales. The royalty base is revenues or transactional revenues collected.

Q Let's go to the Leftbid license agreement, which is Tab 2. It is Defense Exhibit 387. Specifically go to page 4, Section 4.1.3. There is a phrase from the left. It says, The term gross transactions means gross transactional revenues collected or earned. Do you see that, sir?

A I do.

Q And what do you understand that to mean?

A That means money collected. And it was from that clause that I took those terms, those words transactional revenues [2520] collected or earned, and put it on that exhibit, that demonstrative exhibit that we just looked at. So I looked at these agreements, like the Leftbid agreement, and saw what the royalty base was and then put that on the demonstrative.

Q Let's go to Tab number 3, which is the Aden license agree-ment. And this, for the record, is Defendant Exhibit 379. Go to page 5, Section 5.1.5. States there, The term gross transactions means the gross transactional amount collected or earned by the company. Mr. Weinstein, what does that mean?

A It means revenue collected. It means money collected. It's essentially the same as the last one.

Q Let's go to Tab number 4, which is the Navlet license agreement. It is Defense Exhibit 377. Specifically page 3, Section 3.2. This states, Under the royalty, Navlet shall further pay MercExchange an annual payment the greater of the first 50,000 gross transactions collected or earned by the company. And then it says, or two, and there is—it's a little mixed up. It says 2.5 percent and then 1.5 percent, continuing royalty of, and then it's handwritten in there net revenue. Do you see that?

A Yes, I do.

Q And what does that mean to you?

A Again, it means money collected, net revenue.

Q And the section above that saying gross transactions

[2521] collected or earned, what does that mean?

A It's the same thing. It means money coming in the door.

Q Would you pull up Exhibit No. 5—I'm sorry, Tab number 5. Go to Section 1.4.

THE COURT: That's Exhibit 124—

MR. RANDALL: That is actually plaintiff's exhibit, Your Honor. I believe it's 731.

THE COURT: All right.

BY MR. RANDALL:

Q There it says, The term listing fees means gross fees derived and actually collected in the applicable calendar quarter by licensee. What does that mean, sir?

A That means money that comes in again. It's not just the listing fee, but it has to be actually collected. But it's certainly nothing like gross merchandise sales.

Q Beside the license agreements, do Messrs. Evans and Troxel offer any other support for their use of gross merchandise sales as a royalty base?

A I don't believe they do. In fact, my recollection from the deposition of, I believe, Mr. Troxel is that he typically sees royalties based on net revenue, not gross merchandise sales.

Q Have you, during your work, formed any opinion regarding whether or not this gross merchandise sales figure would be more certain or reliable than revenue as a royalty base?

[2522] A I believe, if anything, it would be less reliable. Revenue is typically used as a royalty base. As I indicated previously, I have looked at hundreds of license agreements over the years, and they use revenue as a royalty base. Royalties are applied to revenue.

In addition, revenue is a concept that is audited by accountants and by accounting firms. It's subject to certain account-

ing principles known as gap. It's a very standard measure and it is therefore reliable. Gross merchandise sales would not be nearly as reliable apart from the fact that it's not collected and companies don't pay on it.

Q Well, wouldn't the use of gross merchandise sales, wouldn't that lead to reasonable results if you were to apply gross merchandise sales, for instance, in every situation to this royalty rate?

A I don't believe so.

MR. STILLMAN: Objection. Leading.

BY MR. RANDALL:

Q Have you formed any opinion about what type of results application of gross merchandise sales to a royalty rate would lead to?

A In my opinion, a party would not enter into an agreement based on—that is, a paying party, the licensee, would not enter into an agreement based on gross merchandise sales because it would expose it to the possibility that it would [2523] collect less money on a transaction than it would have to pay pursuant to the agreement.

Q Can you give an example of such a situation?

A Yes. By way of example, I believe that when a car, an automobile or a vehicle is sold on ebay, there is a listing fee of $40, and then if a deal takes place, there would be another transaction fee of $40. So if eBay—if a car is sold on eBay, eBay would get a $40 listing fee plus a $40 transaction fee or $80. That would be eBay's revenue.

If you applied Mr. Evans or Troxel's percentage against the transaction price of the car, the gross merchandise sale, if the car sold for more than 11 or $12,000, eBay would have to pay more for that car to MercExchange than it would receive in fees; that is, .75 percent, which is the percentage that Mr. Evans and Troxel used, apply against a $20,000 car. Gross merchandise sales of $20,000 would be a hundred and fifty

dollars.

And so if you did a royalty based on gross merchandise sales, eBay would have to pay MercExchange $150. EBay's revenue from that entire transaction would only be $80. So eBay would lose $70 on that transaction, would lose more if the car was more expensive. Would still lose money if the car cost about $12,000 or more. And that makes—eBay would never enter into that kind of agreement.

And the ground rules of what brings us here today, [2524] in my experience, is that the parties must enter into an-agreement that they both live with. And eBay would not enter into an agreement where it was exposed to paying more for this technology than it was receiving. That makes no sense. It would never happen. It could never happen. But that's the consequence of relying on gross merchandise sales which eBay doesn't get.

Q Based on your work in this case and your review specifically of the work performed by Drs. Maly and Wellman, what effect, if any, would the ability of eBay and Half.com to design around the patents-in-suit have on this reasonable royalty?

A Those two gentlemen prepared reports in this case, which I have had an opportunity to review, and in their reports they indicated how much time it would take to design around the '265 and the '176 patents and what the cost would have been. And based on their computations, I have concluded that eBay could have designed around those two patents for less than $15,000 within the amount of time that it would have been necessary to enter the market, within the amount of time that was available to eBay here; and, as a consequence, that—$15,000 becomes the absolute maximum that eBay would pay for the patents-in-suit, assuming they are correct and they could, in fact, have designed around at the cost figures they provided.

MR. RANDALL: Mr. Davis, would you put up demonstrative number 6?

[2525] BY MR. RANDALL:

Q What is this demonstrative, sir?

A This is a summary of the testimony I have just given. That's a document prepared under my supervision at Micronomics.

And going down the left-hand side are the patents-in-suit, the '265 and the '176 patents. And in the body of the table are figures for how long in the estimate the estimation of Mr. Wellman and Mr. Maly it would have taken to design around those patents. That's the 200 hours for eBay on the '265 and 100 hours for Half.com on the '265 and a hundred hours for Half.com on the '176 patent.

And then the next column is the cost per hour that would have been incurred, according to Mr. Wellman and Maly, to do those design around. And so over on the right is the total design-around cost for each patent. And when one adds all of that up, the sum is $14,500. And that sets the maximum as to how much eBay would be willing to pay, because if eBay is asked to pay more than that, it will simply adopt the design-around solution.

Q And your work on this case, including the review of Maly and Wellman's information, assumes infringement, right?

A It does. It assumes that eBay has to do something. It [2526] assumes infringement. Also assumes that the patents are valid.

Q Which may or may not be actually the case, right?

A That's true, but I assume both infringement by eBay and validity.

Q Have you identified factors that would have been considered by the parties in a hypothetical negotiation?

A Yes, I have.

Q And please identify those factors.

A In matters such as this, what one does is put the parties into what's called a hypothetical negotiation. In other words, you force the parties to sit down-and negotiate at the time that infringement begins. Even-though there never was a negotiation, that's why it's called a hypothetical negotiation.

And in analyzing how that hypothetical negotiation would have come out, what I do here, and what I have done many, many times in the past, is apply what are called. the Georgia-Pacific factors. And there are 15 factors that are applied in situations like this which presumably would have been in the minds of the parties who were engaged in this hypothetical negotiation at the time. And so I have considered the Georgia-Pacific factors in connection with my work here.

Q And what conclusions, if any, did you draw in your work [2527] in applying the Georgia-Pacific factors to this hypothetical negotiation?

A Well, the ultimate conclusion is that the results obtained by Mr. Evans and Mr. Troxel substantially overstate actual damages that might have been experienced by Merc-Exchange. But what I did in my analysis is I went down each of the Georgia-Pacific factors and thought about whether, other things equal, that factor would have produced a high or a lower royalty rate.

Q And what were your conclusions with—general conclusions with respect to that work?

A The general conclusion is that the royalty rate that would have emerged from a hypothetical negotiation is very low, and whatever that royalty rate is would have been applied to net revenues, not to gross merchandise sales.

In addition, based on the analysis, I have concluded that the maximum that would have been paid would be limited by the design-around cost that we just looked at.

Q Now, also, as part of your analysis of the Georgia-Pacific factors, did you also review MercExchange's patent license agreements in this case?

A I did.

Q And to whom were those agreements entered into?

A They were entered into with Aden, Leftbid, Naviet. I think we saw one for AutoTrader and Goto.com.

[2528] MR. RANDALL: Before we get into those for a minute, can you put up demonstrative number 7?

BY MR. RANDALL:

Q Can you tell us what this is, sir?

A Yes. This is a demonstrative exhibit prepared under my direction at Micronomics. It's called Thomas Woolston's roles in the Aden entities, and it contains four of his business cards. One for MercExchange, where he is shown as the managing director; one for Aden, where he is shown as the chief technology officer; one for Navlet, where he is shown as the chief executive officer and president, CEO and president; and one for Leftbid.com, where he is shown as the CTO, which is chief technology officer.

Q And what effect, if any, did this have on your opinions with respect to your review of these Aden family agreements?

A Well, you recall that I reviewed license agreements between MercExchange and each of Leftbid, Navlet and Aden, and it's clear to me that these agreements were not arm's-length transactions. One of the requirements of the Georgia-Pacific analysis, when you are looking at license agreements is that the license agreements be an arm's-length transaction. Indeed, the whole point of the so-called hypothetical negotiation process is to put the parties back and force them to engage in an arm's-length negotiation producing an arm's-length result.

[2529] Here and elsewhere there is information that indicates to me that these entities were not arm's-length entities, and these license agreements were not the result of arm's-length

transactions.

Q Did you review the reports of Messrs. Troxel and Evans?

A I did.

Q Did you note their disagreement with you on that subject and opinions that, in fact, these were arm's-length agreements?

A I did note that they treat these as if they are arm's-length agreements. I respectfully disagree.

Q What effect, if any, on your opinions did Mr. Woolston's deposition testimony, that he provided legal services to Leftbid throughout the time he was there, have on your opinions?

A Well, typically, license agreements are negotiated at least, in part, by the legal department of the entity, of the company that's-engaged in the licensing process. And so if Mr. Woolston is providing legal services to Leftbid at the same time Leftbid is negotiating a license with MercExchange where he's a managing director, it's not an arm's-length transaction. It's not going to produce what-I would call a market result.

Q What effect, if any, on your opinions did Mr. Woolston's testimony in his deposition, that MercExchange and the Aden [2530] Enterprises had a common legal interest in the successful enforcement of MercExchange's patents, patents against third parties have?

A Well, it confirmed my view that these were not arm's-length transactions. They involve parties that, according to the testimony you just read, have an interest in enforcing the patents elsewhere. So these are not arm's-length transactions.

MR. RANDALL: Could you put up demonstrative number 8, please?

BY MR. RANDALL:

Q Mr. Weinstein, can you explain what this demonstra-

tive is?

A Yes. This is a demonstrative exhibit prepared under any supervision at Micronomics. It is a way of summarizing in pictorial form my review of those five license agreements entered into by MercExchange that I identified. Three are with the Aden entities and subsidiaries. Those are shown on the left, the Aden, Leftbid and Navlet license agreements. And then the other two involve license agreements between MercExchange and other parties, namely, Goto.com and AutoTrader.com.

Q Do you have any understanding as to why royalties were never paid under the Aden license agreements?

A Well, my understanding is that there were no revenues [2531] upon which royalties could be based. The information that I reviewed about the Aden entities indicated that their position was precarious, their revenue either was zero or very low in the context here, and, as a consequence, there would not have been sales sufficient to pay royalties on. That's separate and apart from the question of whether or not these were arm's-length transactions to begin with.

Q Did you draw any conclusions with respect to the Goto.com license agreements identified in this demonstrative?

A Yes, I did, and my conclusions are summarized on this exhibit. Basically, the Goto.com agreement was a settlement of litigation between the parties. It was not just the license agreement. It was a settlement of the dispute between the parties.

Q And so do you know what portion of the payment of $4 million was attributable to just wanting to avoid paying lawyers and what portion would be attributable, if any, to a royalty?

A It's not—

MR. STILLMAN: Objection. He couldn't possibly know the answer to that question.

THE COURT: I'll sustain that. You can rephrase, if you can, or go to another question.

BY MR. RANDALL:

Q Did you draw any conclusions with respect to your [2532] opinions from the fact that this was a settlement of litigation?

A Yes, I did. I know from reading the agreement that the settlement involved a $4 million payment. I also know from reading Mr. Ryan's testimony about it, that it was a settlement to dispose of litigation that was troublesome or annoying to him.

What I don't know is how much of that $4 million might be attributable to alleged damages associated with use of the patents-in-suit here and how much might be attributable to other issues between the parties or the desire just not to pay attorneys anymore to deal with the litigation. I can't break anything out from the 4 million.

Q And you mentioned Mr. Ryan. Was he the Goto.com representative that was deposed in this case?

A Yes, he was. He was designated as the person who was knowledgeable about this subject.

Q Did you note in your review of Mr. Troxel's reports that he applied a royalty rate to this $4 million?

A Yes, I did.

Q And what conclusions, if any, did you draw from that?

A I believe that the calculation that he made to translate the $4 million into a royalty rate was incorrect in the following sense. What Mr. Troxel did was he took the $4 million—assumed that all $4 million related to use of [2533] the patents-in-suit here—and divided the 4 million by revenues over a very brief period of time—I think it was seven months—in order to come up with a royalty rate of about 3.3 percent. I believe that's inappropriate, because under terms of the settlement, Goto.com had the right to this technology for

the life of the patent which extends out to the year 2015.

So when do you the computation using Mr. Troxel's methodology, but for the life of the patent, which is what they got when they got into this settlement, the royalty rate is about .13 percent. That is thirteen-hundredths of a percent, not 3.3 percent.

Did you also—strike that. On this demonstrative, you also have the AutoTrader.com agreement. What conclusions, if any, did you draw about that agreement?

A Yes. That was the—that was one other agreement that MercExchange entered into. And on this agreement, MercExchange would not get any royalties unless it could first enjoin eBay from infringing its patents. That was one condition.

Second, the agreement could be cancelled by AutoTrader on 15 days' notice.

Third, although it's not here on this demonstrative, the terms of the agreement were such that for the first $12 million in AutoTrader revenues, MercExchange would get no [2534] royalties at all, zero percent. And then from 12 to 24 million, if that level of revenue was achieved, MercExchange would get .25 percent, so that the average .royalty for the first 24 million in revenues would be very small.

MR. RANDALL: Your Honor, I have probably five more minutes or so.

THE COURT: Go ahead.

BY MR. RANDALL:

Q You did reach ultimate conclusions in this case regarding damages in this matter; is that right?

A Yes, sir, I did.

Q Would you please state those conclusions?

A Yes. To summarize briefly, I believe that damages would be capped by design-around cost for eBsy. And that

means that the maximum that eBay would pay, based on the reports of Mr. Wellman and Maly, would be $15,000.

In addition, I did a computation, which is contained in my report, that if in fact only certain transactions, namely, those involving a seller's use of the digital image and the use of the Billpoint pay system were found to infringe, damages would be roughly $50,000 against eBay.

Finally, I concluded that the maximum damage, if I use revenues but not gross merchandise sales, but revenues, and apply to those revenues the same royalty rates that had [2535] been developed by Mr. Evans and Mr. Troxel, damages then would be 1.2 million against eBay and 1.2 million against Half.com. But think that that last—those last two figures overstate damages given the design-around cost.

Q You mentioned Billpoint in your answer. What impact, if any, on your opinion—strike that. You have reviewed the deposition transcript of Mr. Trowel; is that right?

A I have.

Q What effect, if any, on your opinion did Mr. Trowel's testimony, that he was not going to include in his opinion anything regarding PayPal to support his damages conclusions, what effect did that have on your opinion?

A Well, I assumed that therefore there were no damages computed by plaintiff's experts that involve PayPal transactions.

Q Let me ask you. Assume, for instance, in connection with this hypothetical negotiation that in October of 2000 MercExchange's owners got together and determined the entire value of the company for tax purposes of $50,000. What effect, if any, would that have on your opinion regarding the damages in this case?

A Well, if that were true, that would set a limit as to how much value one could assign to these patents. If the entire

value of the entity taken as a whole is $50,000, then the patent value can't exceed that. It would have to be either [2536] equal to it if that's all there is in the entity or less than that if there is something else in the entity.

Q One more question. If the jury finds that eBay and Half in fact do not infringe, or if they find that these patents are invalid, should they disregard your testimony?

A Well, if they find that there is no infringement or the patents are not valid, then damages would be zero. There would be no damages.

MR. RANDALL: Thank you. I have no further questions.

THE COURT: We'll take a break at this time. (Whereupon, the jury departed the courtroom.) (Court recessed at 11:35 a.m., until 11:50 a.m.) (Whereupon, the jury returned to the courtroom.)

CROSS-EXAMINATION

THE COURT: Mr. Stillman.

MR. STILLMAN: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. STILLMAN:

Dr. Weinstein, I'm Greg Stillman. You and I have not had a chance to meet before just a couple minutes ago; is that right?

A Yes, sir, that's correct.

Q Dr. Weinstein, Title 35, U.S.C. Section 284 says, in a patent case, that the court shall award the claim of damages

* * * *

[2540] Q And did you meet with Dr. Wellman to discuss his opinion that for 200 hours at $40 an hour, eBay could design around the '265 patent?

A I did not.

Q So you have not discussed this with Dr. Wellman at all?

A That is correct. I read his report.

Q And so you axe satisfied to offer your testimony based upon your reading of his report?

A Based on my reading of his report and my respect for the proceeding, because I'm aware that he's likely to testify here and be cross-examined.

Q Okay. Now, with respect to the Half.com alleged infringement of the '265 patent, it's your understanding that with a hundred hours of work also at $40 an hour, for a total cost of $4,000, Half.com could avoid infringement of the '265 patent; is that correct?

A Yes, sir.

Q And again, you are relying upon Dr. Wellman's work to reach that conclusion?

A Yes, sir, that is correct.

Q Do you know anything about how that design around would be accomplished?

A I do not. I have reviewed Dr. Wellman's report and Dr. Haly's report.

Q So you are offering this opinion without knowing how this [2541] design around would, in fact, occur; is that right?

A That's correct. My knowledge is limited to my review of their reports.

Q And with respect to the Half.com '176 patent, your opinion that they could—Half.com could avoid infringement of the '176 for an investment of a hundred hours at $25 an hour is based upon Dr. Maly's report; is that right?

A Yes, sir, that is correct.

Q And did you meet with Mr. Maly to discuss his opinion?

A No, I did not.

Q And are you aware of how that design around would occur?

A I'm aware only of what he wrote in his report.

Q Now, as I understand your background, you are an economist by background and trade, right?

A Yes, sir.

Q And as an economist, is it fair to say that you believe that most people would conduct themselves in accordance with their own self economic interest?

A That's a fair statement.

Q Now, do you understand, sir, that this litigation has been progressing since September of 2001?

A Yes.

MR. STILLMAN: 0J, could I get you to hand up an article to Dr. Wellman (sic).

BY MR. STILLMAN:

* * * *

[2573] BY MR. RANDALL:

Q Mr. Weinstein, you were asked a number of questions about your reliance on Drs. Wellman and Maly for their design-around opinions. Do you recall that?

A I do.

Q Let me read to you from Dr. Wellman's December 2002 report and ask you a couple of questions about this. Under the section design-around analysis for eBay, Dr. Wellman states, Notwithstanding the bases for noninfringement identified above, I believe that the eBay could have designed around the '265 patent, to avoid infringement, in the 14-month period between the assumed hypothetical negotiation for determining a reasonable royalty, i.e., July 2000, and the actual date by which the damages period began to run, i.e., September 2001. For example, all of the independent claims 0, 15 and 26 which have been directly asserted against eBay require a communications handler that detects and a predetermined posting terminal identification code and

verifies that the posting terminal apparatus is authorized based on that predetermined code.

Assuming for purposes of this analysis that the eBay cookie system and the eBay API system meet the communications handler recitation, a person skilled in the art could have designed around and avoided this recitation by, one, modifying the eBay source code to remove any inclusion of an /P address [2574] in the eBay cookies; and two, modifying the eBay API system to perform its authorization function based solely on a developer ID and certificate derived from that ID. Neither of these changes would result in any appreciable degradation in system performance.

In my experience, these modifications would have required no more than a hundred hours of work for the cookie system revisions and no more than another hundred hours of work for the API system revisions, totalling roughly 200 hours of work. In July 2000, the standard rate for such work would have been approximately $40 an hour, translating to $8,000 for the design-around implementation.

Under Half.com, given that the Half.com system uses essentially the same cookie system as does eBay, Half would have had the same design-around option as eBay in that regard, notwithstanding the basis for noninfringement discussed above. In my view, Half.com would have been able to effect such a design-around option by modifying its source code accordingly. As with eBay, I believe that this could have been accomplished in the relevant time period for no more than a hundred hours of work, at a standard rate of $40 per hour or $4,000. Such a change would be transparent to the user and would not result in any appreciable degradation in system performance.

Is that the opinion provided in Dr. Wellman's report that you relied upon, sir, with respect to the '265 patent?

[2575] A Yes, it is.

Q With respect to the '176 patent, you reviewed Dr. Maly's report, did you not, sir?

A Correct.

Q Let me read to you his provision with respect to this. Even if—

MR. STILLMAN: Excuse me. I'll stipulate that he laid all of these things. I don't think this is proper redirect, for him to read the reports into evidence. They iught to come through the witnesses who are going to testify so I can cross-examine then about that.

MR. RANDALL: What's important is the reasonableness of this witness' reliance on information that he relied on. He was cross-examined on this. I want to get on the table exactly whet he relied on.

THE COURT: Objection is overruled.

BY MR. RANDALL:

Q With respect to Dr. Maly, again, in his December report he states, Even if, for purposes of this report, Half-com's compare Our Prices feature were presumed to infringe as it presently operates, it is my opinion that acceptable noninfringing substitutes were available at the relevant time. For example, based on my review of the lialf.com system, a computer programmer could have ensured that the half.com Compare Our Prices feature followed the process taught in the

* * * *

[2592] briefs on summary motions and so on.

Q. - Based on your experience and the information you studied and relied upon and considered, do you have an opinion as to the validity of the claim of the '265 patent?

A. Yes, I do. The conclusion I've reached is that the claims of the '265 patent are not valid for obviousness over the prior art.

Q. Let's focus on the '265 patent.

MR. RANDALL: Can you put up Tab 2? I'm sorry, it's No. 34.

BY MR. RANDALL:

Q. Dr. Wellman can you—first of all, tell us what this slide is?

A. What that slide does is explain some of the key, the key terms that appear in the '265 patent claims as ruled by the Court.

Q. All right. Did you prepare this slide or was it prepared at your direction?

A. Yes. All the slides we have here today were prepared by me or under my direction and supervision.

Q. And could you just take us through this slide and tell us what some of the information is?

A. Sure. So the way it's organized, along the left we have a column that shows what claims have that language, what the language is and what they mean, and I'll focus on

* * * *

[2611] item, buyer number 2 decides to take delivery. So therefore, since it's in the physical possession of the consignment node in Chicago, it's going to open its safe and have the good shipped to Eugene.

Okay. And there we are.

Q Okay. Great.

Based on your description of the '265 patent's approach, whose responsibility in that system was it to take possession of the goods, inspect them, post them and vouch for the existence and accuracy of the goods' description.

MR. ROBERTSON: Objection, Your Honor. Relevancy. There's no approach. The claim is the final invention. There's not a "jist" or "approach" of the '265 invention. So the question's irrelevant.

MR. RANDALL: Well, I'm asking him, based on his study of the specification and the description of the inventions, what was his understanding as to whose responsibility in that system was it to do those things.

MR. ROBERTSON: That's my point. There's no system. There's a claim that defines the invention that the jury's going to need to determine.

THE COURT: He's studied the claims, hasn't he?

MR. RANDALL: Absolutely. But the point is, is that without the description—

THE COURT: I understand.

[2612] Objection's overruled.

A. It's my understanding that this would be the responsibility of the consignment node user to take physical possession and vouch for the existence of these goods for sale.

Q. Are you familiar with the NASDAQ stock exchange?

A. Certainly I am.

Q. And can you summarize the speculation feature that you described here with respect to the NASDAQ exchange?

A. Certainly. In securities exchanges exemplified by NASDAQ, one owns financial securities, but one rarely ever actually has, say, a stock certificate, but rather one entrusts that to the physical possession of a broker in a network of brokerages. And, in fact, suppose I have a stock, I own 10 shares of Microsoft stock and I want to sell it. I cannot take this, generally take this certificate within a NASDAQ system and just sell it to you if you wanted to buy it, but rather, I would have to go to my broker, who probably has a certificate or even just a record, an ownership record of that certificate somewhere, and place my order through that broker, who would then post it to the NASDAQ market where such financial securities are bought and sold.

Q. Have you ever heard of the '265 patent described as being similar to the NASDAQ stock exchange?

* * * *

[2653] Q Were there any prior art systems that did the same types of things that the '265 patent tried to d specifically?

A. Yes, there were. One that's particularly worthy of note is a system by Nahan that was developed for the, to develop electronic buying and selling of art, of fine art.

MR. RANDALL: Can you pull up No. 17, please?

BY MR. RANDALL:

Q. What's been pulled up on the screen—can you highlight the first portion of that—is a patent listing, among other folks, Ken Nahan as the inventor. The patent is entitled Computerized Multimedia Network Realtime Interactive Marketing and Transactional System. And it shows a filing date February 16, 1994.

Do you see that, Dr. Wellman?

A. Yes, I do.

Q. Are you familiar with the Nahan system?

A. Yes. I have reviewed it.

Q. Have you studied the Nahan system in forming your opinions?

A. Yes, I have. I've studied—

Q. Go ahead.

A. Excuse me. I've studied the patent description as well as various press reports and videos describing the system.

[2654] Q. What was the Nahan system generally?

A. Generally it was a system to enable art dealers to form a network for buying and selling of fine art pieces over networks.

Q. Based on your work and your review of the Nahan system, did you form an opinion as to whether the claims of the '265 patent are valid over the Nahan system?

A. Yes, I did. I've reached the conclusion that the claims of the '265 patent are invalid due to obviousness over the Nahan '111 patent.

Q. And what do you mean by obvious?

A. Well, if a claim is obvious, it cannot be patented and a claim is invalid. What that means is that any differences that there may be between the prior art system and the patented system would have been, it would have been obvious how to bridge those to somebody who was skilled in the art.

Q. And can you—you mentioned that you've seen video—strike that.

MR. RANDALL: Your Honor, I would like to move the Nahan '111 patent into evidence. I believe it's defense exhibit 607.

THE COURT: All right.

(Defendant's Exhibit No. 607 received.)

BY MR. RANDALL:

* * * *

[2714] other dealers. Each subscriber gets a McIntosh or PowerPC terminal linked by a private network to a central server in New York. Showing digitized color images on high-resolution monitors, the system presents the artwork in such detail that even the brush strokes are visible, says Douglas C. Scott, Honicorp's acting president.

What would one of ordinary skill in the art understand from this December 5, 94 Business Week article?

A Well, this is another source confirming some of the features of the Nahan system, and, in particular, it points out that the member dealers, the subscribers here, as part of their license agreement are given hardware and software by which to operate as nodes in this dealer network.

Q Was the Nahan system ever featured on national

television?

A Yes, it was.

Q And when was that featured on national television?

A It was featured-on the Today Show in September 1994.

Q September 1, 1994?

A September 1st of 1994.

Q Could you play—this is a demonstrative exhibit. Did you review this Today Show clip from September 1, 1994, sir?

A Yes, I did.

Q And did it—does it accurately demonstrate, at least in part, the operation of the Nahan system that is consistent [2715] with your understanding of the system?

A Yes, it does.

MR. RANDALL: Can you please play this tape?

(Whereupon, the tape was played for the jury.)

BY MR. RANDALL:

Q Dr. Wellman, is there any doubt in your mind that the '265 claims are invalid because of the Nahan reference along with, if necessary, the bar coding and camera art that we saw?

A I have no doubts.

Q In analyzing the Nahan system, did you ever prepare a claim chart that compared each claim of the '265 patent against the Nahan system?

A I did. I very thoroughly went through all of the claims and all the parts of the claims and laid that all out in comparison with the Nahan system and documented all that.

MR. RANDALL: Would you pull up number 38, please?

BY MR. RANDALL:

Q When I mention claim chart, what did you do with respect to preparing a claim chart? In answering the question, if you would just tell us what a claim chart is.

A Okay. Well, this is one page from the claim chart that appeared in my December report. What this does is for each claim—this is the claim chart for claim 1.

Q Why don't you go to 56 of this document. Okay. There you go. This is page 51. I'm sorry. 51 shows claim 26 up

* * * *

[2746] Q We already went through this, but the Gifford '785 patent, did you form an opinion about whether that includes terminal authorization?

A Yes. We discussed the Gifford patent yesterday that described several patent techniques, including those that are based on authentication, based on a network address.

Q Based on everything that you have reviewed and relied upon regarding the AMC system, did you form an opinion regarding the invalidity of the claims of the '265 patent based on that system?

A Yes. I concluded that the claims of the '265 patent are invalid over the AMC system for obviousness or anticipation.

Q Did you—in connection with your December 2002 report, did you prepare a detailed claim chart identifying all of the elements of the '265 claims and all of that language, and compare that with the evidence of the AMC system, specifically from the AMC patent, from the declarations supplied by Magliato and DiMaggio under oath, and from the depositions?

A Yes, I did. Just as we showed—just as I showed for the Nahan prior art, I created a detailed claim chart with respect to the AMC system that shows claim by claim how the art in the AMC system, possibly in conjunction with Gifford or other well known art at the time, would invalidate each claim due to obviousness or anticipation.

Q And was that claim chart some 21 pages long?

[2747] A Yes, I believe it was.

Q And did you—in creating that claim chart, did you identify specifically the evidence that you relied upon to

support your conclusion of invalidity as to claims 1, 4 through 5, 7 through 8, 10, 13, 15, 17 through 18, 20, 22, 23, and 26 as invalid because of the AMC system?

A Yes, I did.

Q And that was provided to opposing counsel with your December report; is that right?

A That's correct.

Q And is that also—did you rely also on your work in preparing that chart in forming and rendering your opinion that all of the claims of the '265 patent are invalid because of the AMC system?

A I'm sorry. What was the question?

Q Did you rely on your work in preparing that claim chart and in rendering your opinion that the '265 claims were invalid because of the AMC system?

A Did I rely on what?

Q Did you rely on your work that you performed—

A I'm sorry.

Q —in preparing that report?

A. Yes. Certainly I did.

Q Okay. I'm sorry. In preparing that chart.

A Yes.

[2748] Q All right.

MR. RANDALL: Could you pull up number 29?

BY.MR. RANDALL:

Q Now, can you please describe—we have gone through; I believe, the top part of this chart with respect to the Nahan, your opinions regarding the invalidity of the '265 claims due to Nahan. I'd like to address your attention to the bottom half of this chart, Dr. Wellman. Please explain what that is.

A Well, this is a parallel summary of the, claim chart that I prepared with respect to the AMC system that summarizes which claims are invalid, for what reason, using which prior art.

So this says is that—this row here says that claims 1, 2, 4, 5, 7 and 23 are invalid for anticipation by the AMC system, which means that the AMC system covers all of the elements of those claims.

Q By itself?

A By itself.

Q And the next row?

A The next row says that claims 8, 13, 15, 20, 22 and 26 are invalid for obviousness over the AMC system or alone, or alternatively, in combination with the Gifford patent related to transaction methods, online transaction methods.

The next row says that claims 10 and 17 are invalid for obviousness over the AMC system, or alternatively, the AMC [2749] system in combination with the Rose patent. That was the bar code patent, one of the bar code patents.

And finally, the last row says that claim 18 is invalid for obviousness over the AMC system, or alternatively, the AMC system in combination with the Nahan patent.

And, in fact, Dr. Wellman, are those your opinions with respect to the invalidity of the '265 patent claims relating to the AMC system that you have just' described?

A These are my opinions.

Q And is this chart, specifically the bottom half, a summary of the detailed claim chart element by element that you provided with your December report that you previously testified about?

A Yes, it is.

Q In reaching your opinion that the claims of the '265 patent were obvious, did you consider any other additional objective evidence that the claims were indeed invalid for obviousness?

A Yes. I considered some evidence based on arguments from the plaintiff's experts, Dr. Weaver, that said that the very success of the eBay system represented evidence that the '265 patent is not obvious.

Q Did you—based on your review of the prior art and of the patent and of this other information regarding eBay's success, did you form any opinion about whether eBay's success

* * * *

[2752] Half.com infringed the '265 claims?

A Yes, I was.

Q In forming your opinion with respect to eBay, what materials did you review?

A Well, I have—I'm familiar with the operation of eBay's system from being an eBay user since 1996. I have used my own knowledge of the field. I also reviewed some depositions of eBay personnel. I have spoken with eBay personnel. Of course, I have reviewed the materials presented by the plaintiff's experts.

Q Did you review production documents, including source code?

A Yes. I reviewed various source code and other software documentation and specification.

Q And, in fact, in forming your opinions regarding eBay's noninfringement of the '265 claims, did you rely on the production documents, including source code, the deposition testimony of eBay engineers, your review and study of the operation of the Web site, and your interviews of the engineers?

A Yes, I did.

Q And do you feel that you have—strike that. Based on your understanding of the operation of eBay through the information you reviewed and relied upon, do you have an opinion as to whether or not eBay infringes the '265 claims?

[2753] A Yes. My opinion is that eBay does not infringe any of the '265 claims.

Q With respect to Half.com, what materials did you study in forming an opinion regarding noninfringement by Half.com?

A I studied materials describing the software operation

of Half.com, including source code and specification materials. I also reviewed depositions of Half.com personnel and I have spoken with Half.com personnel.

Q Did you also review production documents?

A Yes.

Q All right. And did you, in fact, rely upon in forming your opinions regarding Half.com's noninfringement, did you rely upon in the production documents, including the source code, the deposition testimony of Half.com engineers, the operation of its Web site, and your interviews of the engineers?

A I did.

Q And based on that information that you reviewed and relied upon, did you form an opinion about whether Half.com infringes the claims of the '265 patent?

A Yes. My opinion is Half.com does not infringe any of the claims of the '265 patent.

Q Did you also review materials from a company called ReturnBuy to see if they infringed the '265 claims?

A Yes, I did.

[2754] Q And did you review and rely upon production documents, including source code, deposition testimony, and an interview of engineers of ReturnBuy?

A Yes, I did.

Q And based on your understanding of the information that you reviewed and relied upon regarding the ReturnBuy, did you form an opinion about whether or not ReturnBuy infringed the claims of the '265 patent?

A Yes. My opinion is that ReturnBuy does not infringe any of the claims of the '265 patent.

Q In forming your opinions with respect to noninfringement, did you review and rely upon Exhibit No. 34, which is an article by Lee Chae titled The Basics of E-mail Access?

A Yes, I did.

MR. RANDALL: Your Honor, I would move Exhibit 34 into evidence.

THE COURT: All right.

(Defendants' Exhibit 3 was received.)

BY MR. RANDALL:

Q In forming your opinions regarding noninfringement, did you also review Exhibit 270, which is a document also about how e-mail operates?

A Yes.

MR. RANDALL: I move 270 into evidence, Your Honor.

THE COURT: All right.

[2755] (Defendants' Exhibit 270 was received.)

BY MR. RANDALL:

Q Let me ask you for a moment about design-around issues. Are you familiar with that concept?

A Yes, I am.

Q I understand, as you stated to this jury, that you believe that neither eBay nor Half infringe the claims of the '265 patent. But assuming for a moment that there was infringement, and I know that you disagree with that, but assume for a moment that there was. Do you believe that there is anything that eBay could do to change its system such that you would eliminate one of the arguments that plaintiffs has asserted about infringement?

A That's right. To imagine that eBay is infringing, I would have to say, suppose hypothetically that one of their arguments was actually correct, how they have associated something that eBay does with the part of the claim that they do not practice. One of those elements was the terminal authentication or terminal authorization of a user. They have—

Q And with respect to that, you believe that the '265 claims require terminal authorization?

A That's correct.

Q Go ahead.

A That's correct. My understanding is that the plaintiffs [2756] have argued that the fact that the eBay cookie includes an ACP—an IP address, constitutes a use of a terminal specific authorization. My opinion is that eBay could quite simply remove the IP—the portion of .the IP address that they do include in that cookie, could remove that quite easily and thus design around the argument for infringement.

Q When you say quite easily that eBay could remove this IP address from its cookie, approximately how much time would it take to do that, and what, in ycur opinion, would be the cost to do that?

A I think it could be done in about a week of programming and testing, about 40 hours, that is; and so it would cost a few thousand dollars.

Q And what would that do to the removing this cookie, this IP address from this cookie? How drastically would that affect the overall performance and success of eBay?

A My opinion is that it would not affect at all. In fact, it's rather questionable whether they are gaining anything by including that IP address as IP authentication is quite reliable and not really even precise for the purpose they are applying it.

Q And with respect to eBay's use of API, what would your answer be with respect to that issue?

A They could similarly modify how they authenticate an API application so that it would not effectively uniquely identify [2757] the API application. That would be very—that would be similarly simple to accomplish, and would also not result in any degradation of their performance.

Q And what about Half.com? What could Half.com do with respect to eliminating one of the arguments that' plaintiffs is relying on?

A Well, I have actually not seen any evidence that Half.com does even those things. But if they did, then they could just as easily as eBay remove those elements.

Q Okay. Have you prepared a summary—by the way, do

you believe that the inclusion of an IP address in a cookie somehow authorizes a terminal to do anything on eBay? A

A No. On eBay, whenever some action is required, the user name and password must be presented; that is, a name and a password of a particular user, not of a terminal. Even when the cookie is presented, still nothing happens until the user name and password is read from that cookie.

Q So at any point in the operation of eBay's site, is the terminal alone authorized to do anything?

A No, it's not.

Q Have you prepared a summary chart of your noninfringement opinions with respect to the '265 patent?

A Yes, I have.

MR. RANDALL: Can you pull up 2), please?

BY MR. RANDALL:

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[2861] MR. RQBERTSON: I'm sorry, Your Honor.

THE CQURT: Okay.

MR. ROBERTSQN: But it's been the subject of testimony, and this witness has just indicated that he's familiar with the Get Item function call. I think I'm entitled to inquire.

THE CQURT: Just rephrase your question.

BY MR. ROBERTSQN:

Q. Are you aware, sir, that ReturnBuy utilizes the get item function call to request information about an Item and track it through eBay's system?

A. I'm not aware of the specific function calls that ReturnBuy uses. I Imagine they might use such function calls. I, however, do specifically believe that they do not use a tracking number, ReturnBuy or eBay, for any purpose based on specific testimony.

In fact, if I may continue, Hr. Scharer did explain how they do track it. They said that they include their own license plate number in the description field when then post an item For eBay. So when they get a notification from eBay saying that the auction is over or whatever, they can see the text of that license plate, their own number there, and use that for tracking the good.

Q. I want to shift to this discussion we've had about 5 the design-around that you provided an opinion with regard [2862] to. Are you familiar—do you remember that?

A. Yes.

Q: I understand it was your opinion that eBay could have designed around the '265 patent for approximately $8,000, correct?

A Correct.

Q. Okay. Who have you talked to at eBay about this design-around?

A. I didn't consult with anyone at eBay about that. I had examined the software specifications for the relevant parts of the code that would be involved.

Q. You are aware, however that eBay never adopted this proposed design-around that you identify for either the cookie or the application programming interface?

A. I was not proposing to eBay that they should adopt such design-around.

Q. It was your opinion, however, that this, if they adopted these design-arounds or if Half.com adopted these design-arounds it would have no degradation with respect to their operation? That they would be virtually seamless to the outside world?

A. There would be no significant degradation.

Q. Well, if in fact that was the case, that they could have adopted this design-around, in your view this [2863] simple and inexpensive, why do you think they didn't do it?

A. Well, it is not my position to propose legal strategies

to eBay, but it is my opinion that they're not currently infringing, and this design-around exercise was conducted under the assumption that a hypothetical—that an argument put forth by the plaintiffs for how somehow an eBay practice could be matched over to a '265 claim were actually true. If they had done that, I would not be surprised if another such argument put forth. I even just heard a new one in this session.

Q. $8,000 would have been a pretty cheap insurance policy for eBay to have implemented this design-around that you proposed months ago, or even a year and a half ago; isn't that right?

MR. RANDALL: Objection, assumes facts not in evidence, that that would be an insurance policy and we would not still be here, in suit, in court.

THE COURT: Sustained.

BY MR. ROBERTSON:

Q. Well, are you aware, sir, that designing around a patent after you've been accused of infringement is evidence of good faith on behalf of the accused infringer, which is relevant to the issue of whether or not the infringer is willfully infringing a patent?

A. I'm not aware of that.

[2864] Q. If eBay didn't implement this design-around that you have identified, then there would be no evidence with respect to design-around good faith that the jury could consider with respect to this issue of willful infringement that's before them, is there?

A. I have no idea whether there's any such evidence.

Q. Well, aso you sit here today, it is your understanding that this design-around you proposed wasn't adopted by eBay or Half.com, correct?

A. I doubt it was.

MR. ROBERTSON: All right. I have no further questions, Your Honor.

REDIRECT EXAMINATION

BY MR. RANDALL:

Q. Dr. Wellman, you said you spoke with Greg Scharer from ReturnBuy; isn't that right?

A. That's right.

Q. Did you, based on your discussion with him, did you understand him to be knowledgable about ReturnBuy's operation?

A. He appeared to me to e intimately familiar with all aspects of their operation.

Q. Hypothetically, if Mr. Shill, the former CEO of ReturnBuy testified that Greg Sharer was the Chief technology officer of ReturnBuy and knew the details of the

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[3348] Q. All right. They were aware of the fact that taking a trusted network like the ACORN network and putting it on the Internet would have been obvious, right?

MR. STILLMAN: Objection. Assumes facts not in evidence, Your Honor. There's been no testimony that the ACORN system was a trusted network.

THE COURT: Mr. Randall?

BY MR. RANDALL:

Q. Okay, the ACORN system was a trusted network, right?

A. I don't know.

Q. You have no idea?

A. I haven't studied the ACORN network in detail.

Q. The Nahan system was a trusted network, right?

A. It depends on your definition, obviously.

Q. I'm using your definition.

A. Well, there are certain elements of it that are trusted, and I think there are elements of it that are not.

Q. Sir, using the definition that you you've used in this case for trusted network, is the Nahan system a trusted network? Yes or no.

A. I don't think it has a yes or no, because I believe it has elements, some elements of trust and some that are missing.

Q. In rendering your opinion about whether one of

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[3447] at trial. However, it is clear to the Court that substantial questions exist as to whether the defendants infringe any of the asserted claims of the patent at issue.

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[3463] I meant to give you the one with—I don't have the clean copy with me, but it was previously produced.

THE COURT: Okay.

MR. RANDALL: So the way the instructions sit right now, there is an instruction regarding corroboration for prior art, there's not an instruction regarding corroboration if you attempt to get an earlier invention date.

THE COURT: Okay.

MR. RANDALL: The next issue is transfer of ownership. We submitted a instruction, very short, I think it's a sentence, on what is required for transfer of ownership. And right now, although the claims, specifically 8 and 15 of the '265, require transfer of legal ownership, there's no question about that, there is a dispute between the parties, apparently, on what is actually required for legal transfer of ownership. And we've presented the authority and the jury instruction on that issue. It is a straight legal issue. And I just, I think it would be confusing to the jury to have lawyers get up and argue about a straight legal issue. Now, here is the instruction that we provided earlier on transfer of ownership. It does, the first

page is the one with the authority, the second one is the clean copy.

And because we think it's a clear legal question, [3464] number one, and number two, because we think there's a clear answer to it, we think the jury ought to be so instructed.

And then the last issue was the verdict form, but I just, the specter of the lawyers getting up and arguing what is required or what's not required for legal transfer of ownership, I don't think should happen.

THE COURT: Do you want to respond?

MR. STILLMAN: I will respond to that last point, Your Honor.

This is nothing more than a reargument of Markman. I certainly agree that counsel should not be getting up and arguing what is required for a legal transfer of ownership. You've already construed the claims and you have made a determination that's the modification of the data record.

THE COURT: Some of the experts don't agree, but that's okay.

MR. STILLMAN: Well, I think they may not privately agree with you. But the point is that's the law of the case. I don't think anyone should be standing up and arguing that, pursuant to the UCC, ownership passes pursuant to some provision or whatever. I think that this is a Markman issue and I don't think it should be resolved again.

With respect to this other question regarding the filing dates, I haven't even read that. I understand that was something that was filed this afternoon? I'd like the

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[3477] closing arguments—I mean, you all were very good in your opening statements. I don't think there were any problems, if I remember correctly, in your opening

statements. But in closing arguments, as you know, you're supposed to argue what you believe the evidence was and you're supposed to argue what the law is with regard to that evidence, and hopefully for your sakes, make your case convincing so that the jury understands it.

And as I keep repeating this over and over again, this is not a who-went-through-the-red-light and who-had-the-green-light case. This is a much more difficult case. All the jurors can understand that. Or if this was a patent infringement case involving that stool, well, I would think that all the jurors could understand that, because they can see it. But they can't see this. These method patents are so—at least for me, and I'm sure for the jury, maybe not for you all, but for me they're very difficult to understand.

And you know, I had that Covad case where I granted summary judgment, and that was extremely difficult for me. I think that was the first patent case that I ever had. And you know, the Federal Circuit affirmed it, and I'm not saying it for that reason. But again, I had to learn this whole technology. And then I sat on the Fourth Circuit by designation and had to deal with the Telecommunications [3478] Act of, I think it's 1986, if I'm not mistaken. And it was the first case ever involved in the Fourth Circuit in that particular case. Fortunately Judge Michael was assigned to write the opinion.

But those types of cases, when you don't deal with them on a regular basis, are very hard for the judges. And I guess when I was a young lawyer I thought that judges knew everything and the lawyers didn't. But I can tell you one thing: In this particular type of case, that's not the case. I mean, I think I've been honest with you all from the very beginning, that patent is something that we certainly didn't deal in the state court, and I've had a few in the federal court system, and the Federal Circuit has been kind in those cases to me. But this is a difficult case.

So what I'm trying to say is this: When you all do give your closing arguments tomorrow—and I've given you your time limits and you know who goes in the order and the sequence you go—unless it's so terribly obvious, just don't object. There's no reason for it. It's—you know, Mr. Stillman's understanding of what he thinks the evidence is, and that's why I instruct the jury before your closing arguments, not that they're going to remember anything that I saw, that's certainly the case. They may remember some of the little instructions, but they're not going to remember [3479] the complicated instructions. That's why they're going to go in the jury room and deliberate. And Mr. Randall, when you argue, you're going to tell the jury what you think the evidence was and what the law is of the case, and you know, that's your argument.

So unless there's some outrageous statement that's made—with the quality of lawyers that we have in this case I don't expect that to happen—I really would rather—and I think it would behoove both of you to not stand up and start objecting in the middle of someone's closing argument. It doesn't do any good.

The jury was—I can tell you, just looking at the jury's faces yesterday when—and again, I'm not criticizing Mr. Randall—Mr. Randall is obviously an excellent lawyer and knows his case backwards and forwards, and he is goes into minutiae which he feels is appropriate, and certainly is appropriate in many instances. But the jury was getting kind of tired after a while of the cross-examination of the last witness.

I know you felt you had to do it, and I don't disagree with you that you had to do it. But all I'm saying is that they are ready to go back into the jury room and decide this case. And they know it's been contentious.

They weren't there—I wasn't there at the final pretrial, but I've certainly gotten a blow-by-blow at the [3480] final pretrial, and that was a bit contentious to say the least. But there's no point in the closing arguments being contentious. And I think it's only going to hurt your cases.

So if we had an inexperienced lawyer, for instance, getting up here and arguing and the lawyer didn't know what he or she was talking about, that would be one thing. But you all know what you're talking about. And you know, obviously Mr. Stillman has a different spin on this case than Mr. Randall does. Mr. Randall has a different spin on this case than Mr. Stillman does. So I just, it would behoove both of you not to get up and start objecting and objecting to something that's said in closing arguments.

I mean, I'm going to try to make it clear to the jury tomorrow that, you know, this is what I've already told them when I gave the preliminary instructions, that this is what, you know, Mr. Stillman thinks the evidence is and the law is the law. And if you—believe me, if you misstate the law as governed by the instructions, you're going to get burned for that. And I'm looking at both of you at this point.

So those are the instructions. We'll try to clean up the instructions so that the instructions are appropriate. Other than the, frankly other than the fact that we may have gotten a couple of claims wrong or [3481] whatever, some of the instruction objections are simply you just don't agree with the instructions. So it's not what I would consider such horrible error that, you know, some court would reverse on an instruction like that.

I just wanted to make sure that, you know, we didn't, the Court didn't make any terrible errors when it came to the claim numbers and things of that nature, and the law. And I think the law is pretty, pretty—when I say clear, I'm not sure it's so clear. But I mean I think it's pretty much set out.

And so I think that takes care of what we had to deal with this afternoon. We'll have a set of instructions for you all by nine o'clock tomorrow. They will be numbered. You've already addressed your objections as far as I'm concerned. And so I think you're covered under Rule 51. If you're not then, you know, you can deal with it. But I think you're covered under Rule 51. I think it's pretty clear as to where you all stand.

And I can tell you all now that it hasn't been the most fun four weeks that I've ever spent. I certainly know it hasn't been for the lawyers either. I certainly know it hasn't been for some of the witnesses, that's for sure. There's been some wiggling going on in this case that has been pretty interesting to watch. But I do have to say that both sides have prepared their cases admirably, and you all

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[3529] infringes claims 1, 5, 7—I'm sorry, 1, 5, 6, 29, 31, 32, and 34 through 39 of the '176 patent.

MercExchange contends that Half.com indirectly infringes claims 29, 31, and 36 through 39 of the '176 patent by inducing others to infringe.

You have the patents at issue, so there is no need for me to read to you the claims of both patents in this case, unless you want me to.

(Jurors shook heads.)

THE COURT: Okay. Instruction 28. Interpretation of claim terms for the '265 patent.

As I indicated, it is my job as the judge to interpret the terms of the patent claims. I have already done so and the following terms have been defined.

In addition, another general term that may appear in some of the claims of both patents-in-suit is the word plurality.

Plurality simply means the state of being plural or two or more.

1. Market for goods is defined as a trusted network or system where items or goods may be bought and sold.

2. Payment clearing means for processing a purchase request from said purchaser. This is a means-plus-function element. This term shall be construed as a computer system that accepts electronic payment information from a participant, such as a credit card number, e-number—

[3532] 11. Store said tracking number from the market for goods in said data record on said storage device. The tracking number is stored in the data record at the locally connected storage unit, where the local connection may be via a local network.

12. Printing a bar code from said tracking number on said bar code printer. The bar code is a printed form --excuse me. The bar code is printed from the tracking number which has been received from the market.

13. Binding offer for sale of said good. An obligation to sell the good, which is the ordinary meaning of the term.

14. Market apparatus. A market apparatus is a trusted network or system where items or goods are bought and sold.

15. Tracking number printer means slash tracking number scanner means. The tracking number is the one that has been received from the market.

16. Means for communicating to said market apparatus. This is a-means-plus-function element. The function to be performed is communicating to said market apparatus and the corresponding structures include a network card operating with a network software, a modem operating with a network software, and any equivalent structural equivalents thereof.

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[3534] This is a means-plus-function element. It should be construed to cover the following structures for notifying the posting terminal apparatus of the new ownership of the good for sale: An electronic mail system, FTP, which is a file transfer protocol, transmission systems, Internet transmission systems, private network transmission systems, and any structural equivalents thereof.

22. Communication interface. A system that enables communications.

23. Electronic market. A trusted network or system where participants can buy, sell, search or browse goods online.

24. Said notification module providing notification to the posting terminal apparatus in response to said transaction processor processing said purchase request and verifying said electronic payment information. A system that sends information that is received at the posting terminal apparatus after the purchase request is processed and the electronic payment information is verified.

25. Delay payment of said electronic payment or said goods for sale from the first owner to a second owner for a predetermined interval. Delay an electronic payment from the first owner to a second owner for a predetermined period of time.

Interpretation of claims for the '176 patent.

[3535] From the '176 patent, I have interpreted the following terms:

1. Electronic market. A trusted network or system where participants can buy, sell, search or browse goods online.

2. Item is defined as a good.

3. Electronic auction. A process over a trusted network or with a trusted intermediary, where participants can bid on

an item, where the process occurs electronically, such as over a computer.

4. Sequence of steps in claim 1. The limitation of claim 1 is to be performed in the order listed.

Sequence of steps in claims 26 through 39. The limitation of claims 26 through 39 do not need to be performed in the order listed.

I think I'll stop right now since we are on infringement, and we'll take about a 10-minute break.

(Whereupon, the jury departed the courtroom.)

THE COURT: You are right, Mr. Stillman, you may have to start by 1 o'clock. I don't know. We'll take 10 minutes.

(Court recessed at 11:45 a.m., until 11:55 a.m.)

THE COURT: Ready?

(Whereupon, the jury returned to the courtroom.)

THE COURT: Instruction 30. Patent infringement.

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[3636] didn't invent—and this is, something that sticks with you throughout a case, and this will always stay with me in this case—he didn't invent the notion or trusted notion that Dr. Frieder was talking about. He didn't invent encryption or user names and passwords. He didn't invent those things. What he thinks he invented, what he described or attempted to describe in his patent was a specific trusted network for handling goods. That's what he believes that he came up with. That's what he tried to describe in his patent.

And so it is a specific trusted network that he came up with. And a critical question about infringement is, do we practice that trusted network or not? And we do not. Absolutely we do not.

Can you show slide J, please?

I have to turn around or I have to read on this, and on I'm going to need some glasses, I think. But I'll read it.

In Mr. Woolston's trusted intermediary, as I mentioned during opening, that's his system in the middle, buyer and seller on each side, buyer and seller only have to trust the trusted intermediary. The trusted—the buyer deals only with the intermediary. It doesn't really matter about the buyer and seller's reputation. They will never communicate. The trusted intermediary takes possession of the goods, inspects the goods, and Mr. Woolston's system, [3637] that trusted intermediary, is the person that is controlling the posting. So no one can post goods on Mr. Woolston's system except for this trusted, licensed franchisee. Otherwise, you've got all kinds of people out there posting counterfeit goods, whatever. In his trusted system, he said trust the middle man. Trust this guy in the middle, this consignment node operator, and they will be the only ones that can post these goods. They will inspect them and make sure that they're of a certain quality. They will make sure that the description is accurate and they will actually have possession of those goods, so if you buy it, you'll know you get it. And if you buy it and want to sell it over again, you can sell it 'quickly, because it's just still sitting there. We'll just transfer the title over to the new buyer, and if they want to sell it, they will transfer the title over again, but that's what his system is.

He does not, his person is not a person-to-person system. It does not involve a system where the buyer and the seller have to rely on each other. They have to rely on each other that, if I send you the money, are you going to send me the good? If I send you the money, is the good going to be as you described it? And where are you going to send me the good? All these things about a person-to-person system, Woolston's trusted intermediary, trusted network, was trying to avoid that problem.

[3638] I asked their experts also, I believe I asked Palmer and

Weaver about whether or not, whether in Woolston's trusted network, whether the buyers and seller ever communicated, and they said no, I don't think they do. They don't. Throughout his patent what he talks about is those folks, they can't really trust each other. .People generally are not going to trust each other. Why would we have that? Just trust the middle man. And that's why that middle man has to be a trusted, franchised licensee of the hardware and software necessary to perform this system.

Now, the reason why he said—he tried to say or describe that he invented that concept. Mr. Woolston did not invent the concept, his concept that he claims, of a trusted network. You saw evidence from the ACORN network, you saw Perry Blankley, very colorful gentleman, you saw Jay Mintz as well.

And so Mr. Blankley had the idea, Jay Mintz coded the system, they were in Memphis, Tennessee, they started up in the early '80s. By 1986 they had a fully online, trusted network within Mr. Woolston's meaning. Fully online through CompuServe. And it was a method where, if you wanted to sell something, you would send in the good to Mr. Blankley, physically send it to him, you would email or electronically send your description of the good. It would be present on the system, but what Mr. Mintz said is it wouldn't be live. [3639] So it would be there on the system.

When the good got to the ACORN network, Mr. Blankley would inspect it. He would say is this the quality of good that I want to put on, is it priced reasonably, do I want to—is it the description accurate. And if so, it would go live on the auction. That's how it worked. That's the trusted intermediary. That's the trusted network that Woolston was talking about years later. Mr. Blankley did it years before he did.

Blankley had no reason to make up—did he fabricate all of that? No, of course not. And there are a number of exhibits

you can look at too, articles and so forth about the ACORN network. In fact, the Patent Office used the ACORN network a number of times to reject a number of Mr. Woolston's claims. Those exhibits that you can take a look at are 414, 415, 416, 26, and 47 through 49. All regarding the ACORN network.

Also, the Nahan network, that's a trusted system. You bring the artwork to a Nahan dealer, they inspect it, they take a picture of it, they code it, they put it on the system for sale, right? Same type of thing. When I asked Weaver is that a trusted network? He struggled. He said I don't know. I mean, I don't know how you, how you cannot know whether something is a trusted network or not. That's all—I'll get to this in a minute—but it's all part of [3640] property, right? Do you remember Dickinson said, and I believe Mr. Stillman said that you think of a patent like a' property right. Well, with respect to property, whether it's a patent or real property, land, you know what the boundary is. There's a boundary. You know what it is. Well, in patent law you have to know what that boundary is too. And you can't just make up, you cannot just make up some sort of a definition for trusted network. You can't come into court and say I'm going to make up a definition for trusted. network. I don't like what's in the patent, that doesn't work for me, I can't get infringement if I use that, so I'll just make up a trusted notion. If there's notions of trust, I can't ever apply it. I know eBay and Half does it, but I can't ever apply it to anybody else because I really don't know what the boundaries are.

Woolston couldn't give the boundary. Palmer couldn't. Weaver couldn't. Frieder couldn't. Not' one of their experts could tell me how do you know if you're inside a trusted network or outside? How do you know what is a trusted network, what's not a trusted network? They were-all over the map on that one.

Well, it's a trusted notion. There's notions of trust. Things like that. Well, if you have authentication, maybe, and user name and password. Well, those things, that's not what he talked about. In his patent he talks [3641] about a specific trusted network. We don't have it.

Now, I've gone through these over and over, but Mr. Woolston's system, he vouches for the goods' condition and availability. He ensures the good is accurately described. Sounds like ACORN. He takes possession of the good. In Woolston's system, trusted network, he controls posting of the good through licenses, franchisees, and he transfers legal ownership.

See, Mr. Woolston has to, in order to, in order to transfer the Ownership—remember I asked Weaver this? It's common sense. If you're going to transfer ownership of anything, you either own—you either own it yourself or someone has given you the right to transfer that ownership. There's just two ways to do it. I don't care if you're in the virtual world or not. There's two ways to do it. You either own it or you have, someone has given you the right.

In Woolston's system he claims—although he doesn't describe—he claims that there's a bailee relationship. There is a consignment. That means that the good is given to this consignment node owner through a bailee relationship or a consignment contract, and that means that the consignment node owner has the right to transfer title at a given price. He doesn't describe—and I guess that gets into other issues—but he doesn't describe any of the contractual terms that would be required

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[3645] to show you, but In his business plans, same thing. In his business plans, you can look at them, they're going to be back in the Jury room, they're at exhibit 352 and exhibit 93. And he consistent —and exhibit 352, he wrote that right at the

time he was filing his first patent application in April of '95. If you go to the back of that, there Is a garbled printout of the, of a file dated April '95. The I date on the business plan actually shows the date that It was printed. It has nothing. to do with when it was created. And Hr. Woolston said that when he testified.

He testified here that that business plan was from April of '95. And in the business plan he states, The I consignment node will be offered for sale as a franchise. Ho Individual or business may operate a consignment node without being a member of the franchise.

Says the same thing In the patent.

And these business plans, you can't run from them. You can't sag they're not true. These are business plans that you're going to present to people and try to get them to Invest. So what is It? Are you presenting something for people to invest that's not true? I don't think so. I think what he did Is he came up with business plans that matched the patent and, in fact, references his patents throughout the business plans. And they're consistent.

In his October 9, '96 business plan which Is

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[3652] don't do that. We don't infringe any of the claims. Any of them.

Let me talk about the '176 patent. No infringement regarding the '176 patent.

Can you show slide G, please?

And I'm going to go into other areas. But if that first area, if you agree with me, end of discussion. But I've got to lay out the additional arguments as to why we don't infringe. These are all additional arguments unnecessary if you agree with me on the first point.

All right. Here is the summary chart that we put up regarding non-infringement on '176. And I will walk through the argument while that's just sitting there. If you want to look at that, that's fine.

We don't infringe claims 1 and 29. And by the way, with respect to infringements, infringement, if you don't infringe the independent claims, then you don't infringe the dependent claims, all right? So I'm going to focus on the independent claims.

We don't infringe 1 and 29 for three fundamental reasons.

First, we only search a central database, all right? We've said that a number of times. But Half—strike that.

And this, by the way, this allegation is only [3653] against Half, it's not against eBay, all right? Half searches its own database. Its own database. A central database just like Dworkin. The Patent Office, when it looked at Mr. Woolston's patent for this search method on the '176, said we're rejecting all of your claims because of Dworkin. Woolston came back and said, well, I'm not searching a central database like Dworkin, I'm searching a plurality of them for an item. And if you think about it, that's what Woolston claims he was doing. He was searching a number of different consignment nodes or consignment stores for a particular item. That's what he was doing. In contrast, Half just looks in its own database.

Now, Balijepalli testified about that, that they looked in their own database for a good. Maly spoke with Balijepalli about that. Maly reviewed the source code, the documents, and he confirmed that that's what they do. When they search for an item, they search for it in their own central database.

Second. The third parties who provide their information to Half.com, they do it through an FTP file. An FTP file is just a file. Now, it doesn't matter—Balijepalli said a number of

times that that information from these third parties is provided to Half.com. You can say that's pushed to Half.com. It doesn't matter. It doesn't matter if it's pushed or if it's pulled or if it's [3654] scraped. It doesn't matter. It's not a search for an item. Those third parties provide all of their pricing information, they provide it, either they send an FTP file to Half or they put that FTP file with all of the information sitting there for Half to put into its database.

So I think Mr. Stillman said, well, how do they know? How do they know what to put out there? Well, Amazon or some other party puts what they want to put out there. They say, you know, I will give you what I want. I will take whatever prices, whatever information I want to appear on Half's, in your central database, Half, that's what I'll put out. Let me show that you animation for a minute.

Can you play the animation?

Can you speed it up a little bit? No?

MR. DAVIS: Manually want me to do it?

MR. RANDALL: Yeah.

There you go. Okay.

Okay, slow it down. Okay. So there we go.

This information, I don't care if it's being pushed or pulled, it's all of these files containing all of this information. It's not an item, it's a file of all of the information they want to provide to Half. It comes across the FTP. Doesn't matter if they pick it up or not. It gets stored in the central database at Half. Then it's available some later time for a search, okay? That's how [3655] it's done.

You remember the story about—and there is all the information color-coded. I think you all remember that.

Why is it done at night? I don't know. Because maybe there's less users at night. Doesn't mean that it's some secret

thing, it means that there's probably less traffic at night. Nothing nefarious about that.

Okay. You can stop that.

Now, you remember the story about Alexa, right? So let me just go back, and I think I asked Dr. Frieder about this, but if, for example, friends of ours provide these clothes that their girls have out-grown, they put them in a box, put them on their porch. They either drive them over to our house or we go pick up the box, it really doesn't matter, it's whatever they want to give us for Alexa to wear, they give us, it's all in this box. We either pick it up or they deliver it, it doesn't matter. It really doesn't matter if it's pushed or pulled, or we pick it up or they deliver it. But have we search their house? Have we searched their house for an item? If I pull out this cute little jumpsuit or pants or something like that, have we searched their house for that? Absolutely not. No, we haven't searched their house. They have made a collection of information available to us, Whatever they want. Happens to be clothes.

[3656] There's just no way—and use your common sense—there's no way that we perform that search for an item. We don't search that house for a particular jumpsuit or something like that for Alexa. It doesn't happen. It's not a search for an item.

So with respect to '176 infringement, you're going to hear, and I think you have heard, that one of the claims, I think it's 29, can be performed in either, either direction. You could go out and search for an item, pull it back and then the request could come in. But the point about Half is, they never—I don't care which order you want to put it in, Half never goes out and searches a plurality of electronic markets for an item. Never. The only thing that is ever performed is, just like Alexa's box of clothes that people put out in the FTP files: Third parties put a file, they either put it out for Half to pick

up or they send it to Half, it is a collection of lots of data, whatever they want to do. Half puts it in the central database, and at some later point when someone wants a search, then they search for an item in their central database just like Dworkin, all right?

So the other issue, and I said there were three reasons, is that there is insufficient evidence that these third parties are truly electronic markets. With respect to, I think that pr. Frieder said that AlBooks or Buy.com [3657] were electronic markets.

Can you show slide M, please?

All right. So if you recall, to be an electronic market I think you have to be able to buy, sell or browse. And so we asked him, Customers log on and sell items on Buy.com. Yes or no?

"I don't know for sure."

"Based on your study of AlBooks, can users like people in this courtroom log on to Al and sell on AlBooks yes or no?

"I don't know for sure."

He doesn't know. That's an element that he has to prove. He has to prove that you can buy and sell, and he's saying I don't know. So that's just another reason why there's no infringement of the '176 claims. There's no proof that these companies are actually electronic markets.

Also, can you go to slide N, please?

Okay. This is Balijepalli. I think you saw his video. We're not going to play the whole video, I promise you. But he was asked, Which leading online retailers does Half.com search in order to find out the prices they're charging for the item?

"The Witness: .We do not search online retailers.

"How do online retailers provide you with the pricing information?

[3658] "They send us a file.

"How do they send you the files?

"They FTP us the files and we FTP it from them." Can you go to the next one? This is from Dr. Frieder in the trial.

"So for example, if any one of these third parties send, in FTP format, send a file with information about their goods to Half.com, would you agree—"

And he says, "On their own?

"Would you agree that that's not a search, right?" And then he says: "If they just send it on their own, then it is not a search.

"And if they send it to Half.com pursuant to a request by Half.com, to send it periodically, that's not a search either, right?

"It's not a search."

That was on cross-examination. He admitted that exactly what Half does is not a search. And it's not a search.

Go to the next one.

Dr. Maly if you recall, testified, "Retrieval of items is not searching for an item, period." Very emphatic about this. Wasn't touched on cross on this issue.

"Retrieving, that is not part of the search process. Searching is searching, retrieving is retrieving, [3659] and the two don't mix."

All right. So for those reasons there is no direct infringement by Half of the '176. Period.

Let's talk about indirect infringement of the '176.

All right. Now, whether it's eBay or Half, they're both accused of indirect infringement of the '176. The arguments

are the same with respect to both of them. MercExchange is alleging that there are four other independent companies out there that infringe the '176: CNet, BidXS, Bizrate and MySimon. They claim that these, not only do these four third parties infringe the '176, but they're alleging that eBay and Half induced at that infringement.

Now, how do they know how these third parties operate? How does Dr. Frieder know how those four third parties operate? How does he know whether they're using a centralized search like Dworkin and Half? They collect all this data or all this data is sent to them, they put it in a central database, and when somebody wants it, they go grab it? How do they know if it's done that way or if it's done in this described method where they actually go out and search other databases for an item? How does he know that? He doesn't. He has no idea. And he can't possibly know.

Let me show slide P, please.

[3660] All right. So here's Dr. Maly on the left, this is in trial, trial testimony for both. Dr. Maly says.

"Again, the term searching, and this is very important point, this I can tell you as a scientist, you cannot judge what a system does, how a system does it, by looking it from the user perspective. I mean, it's like believing advertising on TV. Only the system itself, the actual code which controls the statement that tells you how it works. So the Web site wouldn't tell you how it works."

Now if you remember, one of the last things I did with Dr. Frieder when he was on the stand was I showed him the Nahan videotape, and I showed him the search and I showed him Bryant Gumbel picking out that outdoor sculpture piece, and it returning several different options for Bryant Gumbel. And I asked him, "So, I said how did this system, how did the Nahan system search for these outdoor sculptures of art?"

He says, "Based on this?

"Yes. Based on this video. Based on watching the system, how did it do it?

"I have no idea how he did it based on just purely watching the system."

Well, he's right. He has no idea. You can't tell. Remember Dr. Maly said he switched, I think CSTR to Dienst, he switched it from one system to the other [3661] overnight without anybody knowing it? You don't know. You have no idea. So Frieder didn't know either. And so for him to say that these four third parties, CNet, BidXS, Bizrate and MySimon, are searching, you know, for an item, all these other electronic markets, versus looking just in their own central database for information that was previously FTP filed to them, he doesn't know. He can't possibly know.

And in fact, MercExchange didn't give him any of the evidence to know. They didn't take any depositions of these folks, they didn't collect any documents from them, they didn't collect their source code, they had no engineering documents from these third parties, they didn't interview the years from these third parties. They did nothing except for Frieder says I played with their system. I looked at it. That's what he said. I looked at their system and I could tell by watching it. You can't tell by watching that. He said that with Nahan.

The other reason why there's no inducement or . indirect infringement is there's absolutely no evidence that either eBay or Half.com encouraged these third parties to search their competitors' sites. I mean, why would you want to do that? What would you want to say to any one of those third parties, great, go search our competitors and line up our prices with our competitors' prices. Why would you want [3662] to do that? You wouldn't want to do that.

So we're not encouraging them to do it, number one. And number two, whatever they're doing, they're doing it without our encouragement anyway. I think BidXS had hundreds of other sites that it searched? I don't know how it searches them, but it has hundreds of other sites that it searches. So is eBay encouraging it to infringe, or is it just going to infringe on its own, if that's their argument, that it's infringing, and if hypothetically it's infringing, is eBay encouraging it or are they just doing it on their own? They're doing it on their own. Same thing with Half.com.

If you have an agreement with somebody, does that mean that you're encouraging infringement? Absolutely not. There is no affirmative act that eBay is, or Half is pushing these third parties, encouraging them to do this. It just doesn't make sense.

All right. So for those reasons there is no direct infringement of the '176 by Half, and there's no indirect infringement by either eBay or Half.

Let's talk about—I keep turning back because I'm under a time constraint and I want to make sure I save a little bit of time, but—and who knows how long I'm going to go? But I do have an end time that the Court will enforce, I'm sure.

[3663] THE COURT: I don't have a gavel up here, but I. . .

MR. RANDALL: I know it.

THE COURT: But I will.

MR. RANDALL: All right. Non-infringement of the '265 patent.

Now, when I talk about non-infringement, we've already gone over the trusted network, so this is, these are just other reasons why we don't infringe.

Can you show slide E, please?

Trusted network is required by these claims by the

language, market for goods, market apparatus or electronic market. And I'm not going to go through why we don't infringe. I already covered all that with respect to both patents earlier on the trusted network issue.

Now, additional reasons why we don't infringe. There is no terminal authorization by eBay or Half.com. That's required by claims—and these are independent claims—claims 8, 15 and 26, okay? They require the detecting and verifying a predetermined posting terminal apparatus identification code. They require authorizing terminals as opposed to users. If you authorize users by a valid user name and password, it doesn't infringe. You have to, in order to meet this element of those three independent claims and all the dependents, you have to authorize terminals. And eBay simply doesn't do that. We don't [3664] have—neither eBay nor Half.

They don't have a list of, well, that's an authorized terminal and that's an authorized terminal, but that one over there is not, and that one over there is not. They don't have a list. Think about Woolston's system. He had a closed, trusted network. He knew who his trusted licensees and franchisees were. He had a code for them just like a Nahan. Nahan had a set of member dealers. They all had a specific code for their apparatus that was in their store. That is the authorized terminal. EBay doesn't do it. EBay, you can post, we said it over and over and over again, you can post it almost anywhere, you can post almost anything, and almost anybody can do it. You have to have a valid user name and password. That's what gets you authorized. That's the only thing that gets you a cookie.

They say, oh, you place this cookie on the thing? That's a user name and password. You don't get that, you can't get a cookie, without a user name and password. I don't care if they hash it, I don't care what they do with it. It's a user name and password.

The interesting question I asked some of these guys on cross-examination were, is the terminal, okay, is the terminal, if we logon from that computer right there, is that terminal ever authorized to do anything; to post, to list an item for sale on eBay, is it ever authorized to do [3665] anything before I put in a user name and password? That's their argument. Their argument is that terminal, that physical terminal get authorized. And it doesn't really matter whether it's by this API or whether it's not through the API. Both of them require a user name and password.

So is that terminal ever authorized to do anything if I don't use a user name and password? And the answer is no, it never is. Never.

Now, how do you get a cookie? If you log in a user name and password, it places a cookie on your machine. And why does it do that? So you don't have to log back on during—you know, you don't have to log back on your user name and password. So yes, it's a convenience, but it's not authorizing a terminal.

What is authorized and only authorized through eBay and Half.com's system is the user. That's it. There are no—otherwise, you know, where are all these unauthorized terminals in eBay? If their argument is true, that eBay does authorize terminals, there are certain terminals that are authorized, where are the unauthorized terminals hiding? Where are they? I don't—you know, that's just a non-sequitur. There are eBay authorized user names and passwords. They authorize people, users, that's it. That's what they do. They don't authorize apparatuses. Mom and dad can't use their user name and password on the [3666] same terminal. After Mom logs on, you would think that that's an authorized terminal. Dad can just come along, sit down... No. You need a user name and password. You can't do it that way. That's why the terminal's not authorized.

And Dr. Frieder, if you recall, Dr. Frieder, when I asked him those questions on cross, he said that user name and password I think was part of the trusted network or something and that enabled me to ask him questions about that? Even though he wasn't their witness on that subject. But he was a Ph.D at 22, I think. So I asked him the question about that, authorizing terminals. Does eBay ever authorize terminals, and he just said no, that's nonsense, no. It's me. They authorize me. I don't—the terminal doesn't buy, the terminal doesn't sell. The terminal doesn't do anything. It's me, Ophir Frieder.

So clearly he understood the issue that it's users that are authorized by user name and password, not terminals.

EBay and Half.com do not have the transaction processor that is required by the claims 8, 15 and 26 and all the dependent claims.

With respect to claims 8 and 15, the claim language itself specifically requires transfer of ownership, okay? This transaction processor transfers ownership. Says it transfers it by modifying a data record, but in any [3667] event, it transfers ownership. We've gone over this a number of times. EBay never, it doesn't own its goods and it doesn't acquire an ownership interest in the goods, doesn't have a consignment contract, doesn't have a bailment contract. It never acquires ownership of the goods such as it is in a position to transfer ownership. And in fact, it doesn't transfer ownership. The users transfer ownership. When the user transfers possession of a good, when you get the good and you've paid for it, ownership is transferred. EBay doesn't do it. EBay's not in a position to do it.

Tom Woolston's system was in a position to do it, apparently, through this consignment contract or a bailment contract. EBay's never placed in the position to do that. And it doesn't transfer ownership.

And when I questioned Dr. Weaver about that he ultimately said he doesn't have a clue on this issue. And he was uncomfortable about it, and I understand that he was uncomfortable because he is a technical expert and he's having to opine on transfer of legal ownership of a good and whether a system does that. He just frankly doesn't know. He has no idea. He doesn't know what the law is. He doesn't know that the transfer of ownership occurs when you transfer possession. He doesn't know that.

But in any event, at a foundational level, eBay doesn't own its goods and never acquires an ownership [3668] interest such that it can transfer it. So it doesn't transfer a good's ownership.

With respect to claim 26; I've got a few slides I'm going to walk through with respect to claim 26 about non-infringement.

Can you show Slide A?

All right. Here is the testimony from Dr. Frieder I believe about the terminal authorization. And it's at the transcript, 1697 through 1698.

"At no time during this logon process to use the eBay site to buy or sell is the terminal or computer authorized to do anything unless you have input a valid user name and password, correct?

"I cannot—I, Ophir Frieder, did cannot buy on Half.com until I have logged onto the system."

Then he goes on, I think goes on to say, "You were asking me does a computer buy or sell. I'm telling you the person buys and sells. So now you say, then you go through it again and you say, okay, the computer buys and sells. I told you no, the person is buying or selling. And the computer has never authorized, eBay or Half.com to do anything. The computer is not the person you are talking about that's buying or selling.

The person is buying or selling."

Dr. Frieder is confirming that it is—you have [3669] to logon, it is the person that's doing the buying and selling, it's the user name and password that's doing the buying and selling, not the terminal.

Go to the next slide.

And so with respect to claim 26, obviously the fact that we don't have a trusted network applies. We don't authorize terminal applies. Any one of these is sufficient to find non-infringement.

This is also Dr. Wellman's testimony. "Those claims all require authorization of terminals, and as I have described just before, eBay and Half do not authorize terminals. One can access and participate in the buying and selling, posting goods.or sale on eBay from any computer in the world that's connected to the Internet. This is in stark contrast with the systems like the '265 system or Nahan."

Go to the next slide.

All right. This was during, I think, the redirect of Dr. Wellman, and there was some suggestion that my summary slide was indirect or unsupported by the evidence, and in fact, it's precisely from the claim of the '265, claim 26.

"In this claim, claim 26, I'm looking at the claim language, it says, Said participant, and if said electronic payment verifies, then notify the owner of said good for [3670] sale by modifying a data record. Do you see that?

"Answer: Yes, I do.

"Does eBay or Half track who the owner of a good is?

"Answer: My opinion is that eBay or Half.com do not track ownership, and therefore it would not be possible for them to notify the owner of a good.

Does either eBay or Half notify the owner of said good by modifying a data record?

"Answer: No, they don't.

"Are you sure about that?

"Yes, I am."

That's the language straight out of claim 26. EBay does not notify the owner, doesn't notify the owner by modifying a data record. Doesn't track ownership.

Go to the next slide.

This is a question of Dr. Weaver. "Do you recognize there's a difference between being the person that lists an item for sale on eBay, like you and this baseball card, and the person that owned the baseball card, right?

"Answer: Yeah, I'm agreeing that they could be different.

"Question: And eBay doesn't-keep-track of the owner, right?

"Answer: Not as separate entity.

[3671] If you recall, that was questioning about Dr. Weaver's demonstration about sale of a baseball card. Dr. Weaver used his mother's account to sell a baseball card that neither he owned nor his mother owned. During his deposition he said that Hunton & Williams owned it, but on the trial, at trial he said he didn't know who owned it.

And I think I asked him about, how, who, how does eBay keep track of who the owner is. He doesn't know. Because they don't. They simply don't. How could they ever know who the owner of that baseball card is?' They don't. They don't keep track. They don't know, and they don't, certainly don't notify the owner of anything as required by claim 26.

Go to the next slide.

This is another issue. A notification module providing notification to the posting terminal apparatus. This is also in claim 26.

"Claims 8, 15—" I'm not going it read through all that. "But those claims require notification of a posting terminal. EBay and Half.com never notify a specific terminal. They may know notify users, and so therefore my opinion is that eBay and Half.com did not infringe those claims for this reason."

Claim 26 requires notification to the posting terminal. That was my questions with Dr. Frieder with him [3672] sitting in Europe at a posting terminal in a coffee shop. If he's sitting there conducting business or listing an item or bidding on an item, so forth, that terminal in the coffee shop in Europe is not going to be notified of anything. Whatever his email account, Dr. Frieder's email account, the notification will be sent to some Web server or some server, email server, somewhere, but it's certainly not going to be sent to that terminal in Europe in the coffee shop. No way. That's what's required by the claim. EBay simply doesn't do it.

Can you put up E again?

All right. So here's a summary slide that we put up during the direct, I think, of Wellman, and also that we've gone through right now. There is no direct infringement by either eBay or Half of any of the asserted claims because there's no trusted network. We don't authorize terminals, we don't have a transaction processor that transfers ownership as required by B and 15, we don't track ownership, and therefore we don't notify an owner of anything as required by 26. We don't send notifications to specific terminals. These are all reasons why we don't.

And in terms of indirect infringement, let me get to that and you can just leave this up.

There is a allegation that somehow there's encouragement of ReturnBuy to infringe. One of the things [3673] about ReturnBuy. Mr. Shill did testify. Mr. Shill on cross-examination, I went through a number of the elements of the claims, and I believe these are claims 1 and 23. One and 23 and their dependents. And I asked Mr. Shill if either eBay or Half encourages—or encouraged ReturnBuy to use storage devices, digital cameras, bar code scanners, bar code printers. I walked through a number of the elements of those claims and said do we encourage or induce you in any way to have used those. He said no. There's absolutely no evidence that we encouraged that.

Did we make an investment? Yes. Did we make a profit? No. They lost a lot of money. What does that prove? It proves that a system that takes in goods inventories them, takes possession of them, is very difficult to make any money on. I think I asked him why didn't you make a profit, and he said we had just too much structure, too much overhead. Couldn't turn a profit. Never did. So eBay made an investment, that's it. EBay doesn't encourage anything else. They certainly didn't encourage a number of the elements required by the claims. There's no indirect infringement whatsoever.

Also, ReturnBuy doesn't use the. I think the ReturnBuy testimony was that their software is what's called venue independent, okay? That's what Greg Scharer testified to. And of course Shill said on any technical issues you [3674] should refer to Scharer. You saw Scharer's testimony. He said the software is venue independent. And the software I believe is called—if I can find this. I'm not finding it.

In any event, what the software does, without any involvement, is decide which sites to list items for sale on. So ReturnBuy's software decides which sites to list them on, not eBay. EBay doesn't decide that.

Also, ReturnBuy uses what's called a license plate. They

have a facility in South Carolina that they handle all the goods at. They assign their own license plate. It's not a identification code or an item number assigned by the market. See, under their theory, they have to prove that there's an item number assigned, for instance by eBay or by Half.com, an item number that is sent to ReturnBuy and then is used by ReturnBuy with respect to that item. That's not what happens.

ReturnBuy uses its own license plate and its own license plate that's independent of eBay's item number. So it never receives an item number from the market. It never puts that in the data record. And so if ReturnBuy, for example, a customer asks ReturnBuy what's happening with one of my items, it's listed on eBay, what's happening with it, what they do is they did a search on eBay's site not for an item, they do a search for the license plate number of the [3675] good. And that's how they find it.

And so ReturnBuy uses its own license plate number for its goods in its South Carolina facility, and that's it. It doesn't use the item number with respect to the good.

And that's just what that point is, that ReturnBuy actually does not infringe because it doesn't use an item number from the market. It doesn't infringe. But also there's no inducement or encouragement to infringe, if you look at Shill's testimony on cross-examination.

Let me talk about damages for a minute.

MercExchange presented some staggering numbers regarding damages, and they're wrong for a number of reasons.

Gross merchandise sales. They used gross merchandise sales as a revenue base. There's no valid reason for using gross merchandise sales. All of the damages experts said that revenue is what's used. Evans and Troxel admitted that they have never used gross merchandise sales before. They have never seen it used. They're not sure what it comprises, what's

in it, what's out of it. There are no rules such as generally accepted accounting principles that govern gross merchandise sales. They perform no studies regarding its accuracy or its use. And in fact, in contrast to that, revenue is governed by generally accepted accounting principles. Revenue is [3676] required to be reported. -Revenue is required to be reported to the SEC and for IRS tax purposes. And he couldn't provide any evidence whatsoever to indicate that eBay or Half.com's revenues, revenue numbers are somehow manipulated in any way.

So if eBay's revenue numbers are not manipulate in any way, and he has no proof of that, how in the world can he tell that some gross merchandise figure that he doesn't even know much about and 'has never used is more reliable? He can't. He has no -basis to say that. None.

And in fact, I think Troxel even said with respect to ReturnBuy, in his report, I think you should use revenue and Troxel said in his report you should-use revenue for Return-Buy because ReturnBuy doesn't have gross merchandise sales. And then apparently he saw religion when, he came here, because he said, well, that was wrong. I should have used gross merchandise sales.

So how do you come up with gross merchandise sales for ReturnBuy? He reached it by multiplying 210 percent times revenue. Something like that. Wouldn't it just be simpler to use revenue? Of course it would. But they want to use a bigger number. They want to use a number that represents money that eBay and Half never see.

So gross merchandise sales means if there is a $250,000 Ferrari sold—and by the way, Weinstein said that [3677] there were pages and pages and pages of Ferraris on eBay. But if there's a $250,000 Ferrari sold, that money goes, 250,000 goes from buyer to seller. And under their theory—and this is, this is why it leads to absurd results under their

theory—Mr. Woolston gets a huge multiple of what eBay gets. EBay gets $80 and Mr. Woolston get a huge multiple of that.

So why are they using gross merchandise sales? Because it's a bigger number. It's money that eBay never sees. It's like taxing a bank for the deposits of all of the people that they have. All of the deposits, not revenue. But all of the deposits a bank has, let's just tax you on that, even though it's not your money. That's, that's not right.

Why did they use it? That's one reason, because it's a big number. They say that we use it in our reports. It's used—revenue is used and governed and regulated. They say that was used in the license agreements? It wasn't. We went through each of the license agreements. Gross merchandise sales was not used. It was a transactional fee collected or earned in nearly all of them. Collected or earned. That's revenue, that's not gross merchandise sales.

I think when I questioned their damages expert, Troxel or Evans, I think they said, well, it doesn't matter, [3678] they're just words.

The use of GMS also not only leads to absurd results with respect to the Ferrari and eBay Motors, which is a couple billion dollars in sales, but also under I think Troxel's theory, we showed that in the-year of this hypothetical negotiation, Half.com would have given up all of its profits and then some for three years to Mr. Woolston? That would have been a reasonable royalty, that they would just hand over all of their profits? EBay would have given up all of its profits in the year 2000 to Mr. Woolston? That was a reasonable royalty?

That's just not, that's not something that's reasonable. It's not something that anybody would agree to.

What did Weinstein say? Our damages expert? He said that—and this makes sense—that a reasonable royalty would be capped at what it would cost you to design around. So you

would only be willing to pay that which you could design around for. Because if you could design around for it, that's what you would do. You wouldn't pay that.

And so you've heard evidence and you haven't heard any contrary evidence to what would it cost, for instance on the '176, what would it cost to make sure that all we.do is search our central database; that we don't go out and search multiple electronic sites for an item. Well, we don't do that anyway. We don't do that. So what would it cost to [3679] make sure that that's what we do? It would cost very, very little. But it's a hypothetical.

But clearly searching a centralized database doesn't infringe.

The other design-around issue, if they say that using this IP address and a cookie infringes because it authorizes a terminal on the '265, what would it cost to take that IP address out? I think the estimate was $12,000. Very, very low. And the reason is because eBay doesn't authorize terminals. It just doesn't. Whatever they say authorizes terminals, taking that out, this ID code, means there would be no infringement and it would be about $12,000. So the cost of design-around is diminimous. Very, very low.

And if they say, oh, No, no, you need to remove the cookies, well, that's user name and password. That's not, that's not authorizing terminals.

All right. The other kind of thing that you think about in damages is the reasonable royalty should be less than the value of the entire company, I would think. MercExchange, if you recall, Mr. May testified about this, in May, I'm sorry—in I think October of 2000, which would have been a little bit after this hypothetical negotiation, in October of 2000, the board of directors or members of MercExchange got together and set the value of the entire [3680] company, and their assets are just these patents, at $50,000. And Mr. May said,

well, we just did that for tax purposes. Well that's, that's legally binding. When you say I'm doing it just for tax purposes, I'm doing it just what I'm reporting to the Government, that's your best—either you're committing fraud, either you're committing a crime or it's accurate. And we'll say that it's accurate. And so that's what they set the value at $50,000. And the damages wouldn't be any higher than that.

Lastly, I don't think that the evidence in Troxel took into consideration at all about the degree of infringement. If you assume infringement, they said even if you did it just one time in one year, we'd still be entitled to the whole $43 million or something. Just one transaction infringed, we would be entitled to that. That's just not right.

And Weinstein said no, no, you have to measure damages based on kind of what the infringing activity is. And Weinstein read the reports and deposition transcripts of Evans and Troxel and testified that they agreed, that they weren't seeking any damages for PayPal, they're not seeking any damage for PayPal. And based on that, if you take the transactions that used Billpoint—yeah, Billpoint is the other payment processor, if you will, but if you take the transactions using Billpoint, you come up with a damages [3681] figure of around $50,000. And so that's another method of getting there.

And then lastly, the damages experts did not take into consideration what eBay licensed patents for. Fox instance, this NES patent, which I'm sorry, I don't have the exhibit number with me, but you'll have it back there. But it's a patent to NES, and eBay took a license on that for about $250,000. And during trial we read through the abstract about that patent. And so that's another indicator of what kind of these things axe roughly worth.

The OnSale patent, you heard from Fisher and from Kaplan about OnSale and about their patents. They had three patents. Those were purchased outright—not a license, purchased outright fox something like $655,000. So those give you some sort of kind of a ballpark of what this, what the real value would be if these was infringement, but there's not.

The eBay meeting, I'm just going to briefly touch on that. If you recall, MercExchange contacted eBay because they wanted to do some horse trading. They contacted eBay. EBay asked for what's called power of inspection. Said that we'd like to go look at the Patent Office's files of all of your patent applications, and they said no. Can't do that. Mr. Woolston testified no, we didn't allow you to do that. They didn't send the prosecution files to eBay. They didn't [3682] do anything. What would eBay have found? Because this information is not public. All of the stuff that the Patent Office and everything that's going on is not public. What would they have found? They would have found all of the rejections based on all this prior art. They would have found the Nahan patent and other patents and all these rejections.

And at the time of this meeting, the. '176 had not issued. Woolston admitted in the Wall Street Journal and admitted on stand that, at the time of this meeting, there was no infringement of the '265 patent. So the only evidence in the record is that they wanted to horse trade, they had nothing to offer, they wouldn't allow any inspection of the prosecution histories.

And by the way, I think there was a suggestion that there's bad faith on eBay's part? MercExchange had already decided to sue eBay. They decided in—and this came out through, I think, Mr. May and Mr. Woolston—but they had already decided to sue eBay in January. There's an agreement, and it's in evidence, in January of 2000. They had decided to sue eBay. They again reiterated that desire in the summer of 2000. And then they have this meeting and they never in any

of the correspondence leading up to the meeting or after the meeting, there's no suggestion that they want to sue eBay? So who is acting in bad faith? And [3683] eBay doesn't find out about their true intent until they're sued, complaint's filed here in court here in Virginia? That's not good faith.

All right. Let me talk about validity for a few minutes.

There's two basic validity issues with respect to the patents, of one is what's called section 112. And section 112 is you have to provide and get adequate written description of what you claimed, and you also have to provide a sufficient description to allow one of ordinary skill in the art to build, actually build your invention. And those are two requirements that are related to this deal that you make with the United States government that you'll get a patent, but you have to advance the art, you have to enable other people to build it, you have to adequately describe it and show that you are in possession of your invention.

And the other is prior art. And we've gone through a lot of prior art in this case.

All right. With respect to the '176 patent, section 112 invalidity. Number one, there is no—Mr. Woolston does not enable, did not enable the '176 patent claims. If you recall, Dr. Keller testified about what was required to enable one of ordinary skill in the art to practice those claims, and he said that there was no

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[3707] We got here because essentially eBay wanted the court to define the term electronic market. And ultimately, the court made a determination in its Markman ruling that an electronic market—you will remember that the preamble to these claims talk about electronic market comprising—that an electronic market is, in fact, a trusted network or system where one can buy, sell or browse for a good online. So that's

the definition that the court has applied to electronic market. The real question here is whether or not you find that eBay is a trusted network or system as described by the patent.

And so there were questions asked of experts in this [3708] case, well, when are you within the domain of eBay—of Mr. Woolston, actually, the '265 trusted system, and when you are not. Well, the answer is if you are operating a system which employs the trusted features that are described in the patent, then you are.

And what are those trusted features? If you go back and you look at the description, you will see encryption, you will see intermediated payment, you will see the use of password protection, you will see authenticating the user. All of those elements are described in the '265's trusted network or system. And so there is no question to our mind that eBay employs all of them. Indeed, they employ many more to achieve trust over their system that are described in the Woolston patent, but the basic elements are there. And none of those elements, when you go back and you look at the claims of the '265 patent, require that this trusted system take possession of the goods, that require that this trusted system vouch for the quality of the goods. All of the elements necessary to prove a trusted system are present

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[3711] look at how the court defines the word transaction processor. The court has said, quote, a transaction processor is a processor for executing a transaction based on a request and payment from the participant. There is no mention in that definition about transfer of ownership.

But even if you construe the term to include some requirement for transfer of ownership, what has the court told you? The court says, quote—and this is in your instruction—legal ownership of the good is transferred by modifying the data record of the good. This is not the situation where you

are transferring legal title. It does not require Dr. Weaver to be an expert on the law of UCC to explain to you when legal title transfers. And, in reality, when you go to the mall and buy a sweater, I don't think you think much about legal title to that sweater. You buy the sweater and you get a receipt for it. And in this case, when you buy a good over the eBay system, there is a modification to the data record which essentially notifies the market that that good has been sold. There is no requirement that legal title in that formal sense be transferred, and by the same token, there is no requirement that this trusted intermediary therefore have some physical possession of the good. Now, finally, with respect to the '176, as I indicated to you, I think there is one central difference

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